Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
October Term 2009

WILLIAM DAWSON NURSING CENTER, INC.

Petitioner,

v.

EDUARD ADAM GLAVINSKAS,
as Successor Plenary Guardian of the Estate

of Derek J. Thomas, a Disabled Person,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE ILLINOIS APPELLATE COURT

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QUESTION FOR REVIEW

Did the lower courts violate the petitioner's due process rights under the Fourteenth Amendment by failing to address the arguments that the courts lacked jurisdiction to void an approved settlement agreement and final dismissal order?

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TABLE OF AUTHORITIES

I. *Burnham v. Superior Court of Cal.*, 495 U.S. 604 (1990)

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II. *Old Wayne Mut. Life Asso. v. McDonough*, 204 U.S. 8 (1907)

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VI. *Village of Glenview v. Buschelman*. 296 Ill.App.3d 35, 693 N.E.2d 1242 (1st Dist 1998).

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CORPORATE DISCLOSURE STATEMENT

No parent or publicly held company owns 10% or more of William L. Dawson Nursing Center, Inc.

OPINION BELOW

The Illinois appellate court opinion is reported at 392 Ill.App.3d 347, 912 N.E.2d 675 (1st Dist. 2008) and is reprinted in the Appendix. The appellate court's denial of the petition for rehearing and the Illinois Supreme Court's denial of the petition to appeal are also reprinted in the Appendix.

STATEMENT OF JURISDICTION

The appellate court of Illinois entered judgment denying the petitioner's appeal on December 16, 2008. The petition for re-hearing was

denied on July 13, 2009. The petition for appeal to the Illinois Supreme Court was denied on November 25, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES

A. The Fourteenth Amendment to the Constitution:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

B. 735 ILCS 5/2-1401

> (a) Relief from final orders and judgments, after 30 days from the entry thereof, may be had upon petition as provided in this Section. Writs of error coram nobis and coram vobis, bills of review and bills in the nature of bills of review are abolished. All relief heretofore

obtainable and the grounds for such relief heretofore available, whether by any of the foregoing remedies or otherwise, shall be available in every case, by proceedings hereunder, regardless of the nature of the order or judgment from which relief is sought or of the proceedings in which it was entered. Except as provided in Section 6 of the Illinois Parentage Act of 1984], there shall be no distinction between actions and other proceedings, statutory or otherwise, as to availability of relief, grounds for relief or the relief obtainable.

(b) The petition must be filed in the same proceeding in which the order or judgment was entered but is not a continuation thereof. The petition must be supported by affidavit or other appropriate showing as to matters not of record. All parties to the petition shall be notified as provided by rule.

(c) Except as provided in Section 20b of the Adoption Act [750 ILCS 50/20b] and Section 2-32 of the Juvenile Court Act of 1987 [705 ILCS 405/2-32] or in a petition based upon Section 116-3 of the Code of Criminal Procedure of 1963 [725 ILCS 5/116-3], the petition must be

filed not later than 2 years after the entry of the order or judgment. Time during which the person seeking relief is under legal disability or duress or the ground for relief is fraudulently concealed shall be excluded in computing the period of 2 years.

(d) The filing of a petition under this Section does not affect the order or judgment, or suspend its operation.

(e) Unless lack of jurisdiction affirmatively appears from the record proper, the vacation or modification of an order or judgment pursuant to the provisions of this Section does not affect the right, title or interest in or to any real or personal property of any person, not a party to the original action, acquired for value after the entry of the order or judgment but before the filing of the petition, nor affect any right of any person not a party to the original action under any certificate of sale issued before the filing of the petition, pursuant to a sale based on the order or judgment.

(f) Nothing contained in this Section affects any existing right to relief from a void order or judgment, or to

employ any existing method to procure that relief.

STATEMENT OF THE CASE

A. Summary

The petitioner appealed to the Illinois appellate court from the Circuit Court of Cook County after the trial court entered an order granting the respondent's petition to vacate a final dismissal order filed more than 30 days after judgment was entered in the underlying case. The petitioner argued its due process rights were violated, because the trial court lacked jurisdiction to hear the plaintiff's petition filed pursuant to Section 2-401 of the Illinois Code of Civil Procedure. 735 ILCS 5/2-1401. In denying the appeal, the appellate court failed to address the petitioner's jurisdictional arguments and denied its petition for re-hearing. The Illinois Supreme Court also denied hearing the appeal.

B. Trial Procedure

This matter arises out of a motor vehicle accident, in which the disabled plaintiff was a passenger in a car, driven by a non-party tortfeasor and owned by the petitioner. The underlying case was settled between the parties before the Honorable Judge Barbara McDonald on October 12, 2004. For nearly one year after the settlement, neither the plaintiff nor his attorney took any action to have the settlement approved, as required by Circuit Court of Cook County Local Rule 12.15(c).

On December 1, 2005, the court, on its own motion, approved the settlement and dismissed the case with prejudice. (See Exhibit A). The dismissal order reads as follows:

> ... the court having fully reviewed the file [and] facts of this case,

> the judge hereby finds that the settlement entered into of $175,000 between the Estate of Derek Thomas and William L Dawson Nursing Home is proper [and] hereby approves the settlement. This matter is dismissed with prejudice.

Six months after the case was dismissed, the plaintiff's new attorney[1] filed a petition to vacate the final dismissal order pursuant to Section 2-1401 of the Illinois Code of Civil Procedure (hereinafter "2-1401 petition.") See 735 ILCS 5/2-1401. Before the petition was heard, the plaintiff filed an amended petition on December 20, 2006, even though the court had previously denied the plaintiff's leave to file an amended petition on August 23, 2006. (See Exhibit B). On October 19, 2006, the plaintiff's petition was heard without an affidavit or live

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[1] In simultaneous proceedings, the Probate Court removed Sheldon Belofsky as the plaintiff's counsel and appointed new counsel on October 18, 2006.

testimony[2], and on October 31, 2006, the court entered an order stating: "Plaintiff's Motion to Vacate pursuant to 2-1401 is denied with prejudice." (See Exhibit C).

On November 27, 2006, the plaintiff presented a motion for reconsideration of the October 31, 2006, dismissal order. Following a hearing on the plaintiff's motion for reconsideration, Judge Lopez-Cepero entered an order stating, "... the court hereby corrects its October 31, 2006, order, nunc pro tunc, from dismissal [with] prejudice to [Plaintiff's] motion being stricken..." (See Exhibit D). Also in the order, Judge Lopez-Cepero recused

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[2] The Illinois Code of Civil Procedure states in relevant part: "The petition must be supported by affidavit or other appropriate showing as to matters not of record." 735 ILCS 5/2-1401(b).

himself from further handling of the case[3] and transferred the plaintiff's motion to reconsider to the Chief Law Division Judge William Maddux for reassignment.

On November 29, 2006, Judge Maddux entered an order which vacated Judge Lopez-Cepero's November 27, 2006, order and reassigned the case to his courtroom. (See Exhibit E). In a separate order, Judge Maddux also granted the plaintiff leave to "re-file [his 2-]1401 [petition] by December 20, 2006." (See Exhibit F).

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[3]Later in the proceedings, counsel for the plaintiff and the petitioner received a copy of a letter, dated November 3, 2006, from the Probate Judge James G. Riley to the Chief Judge of the Law Division Judge William Maddux in which Judge Riley described a "battle between the Law Division and the Probate Division." Judge Riley voiced his disapproval of the Law Division's handling of this matter. Judge Riley then asked Judge Maddux for suggestions on how to "repair the damage" that Judge Riley felt had occurred in the Law Division. (See Exhibit I.)

The plaintiff's third 2-1401 petition was filed on December 20, 2006, and was later heard after briefing, without affidavit or live testimony, by Judge Deborah Dooling. Judge Dooling granted the plaintiff's petition on June 27, 2007. (See Exhibit J). It was from this order that the petitioner appealed to the Illinois appellate court.

C. Appellate Procedure

On July 31, 2007, the petitioner filed an appeal, which included the arguments that the trial court lacked jurisdiction to hear the plaintiff's successive 2-1401 petitions and that the court had improperly voided a valid and binding settlement agreement and final dismissal order, thereby violating the petitioner's due process rights under the Fourteenth Amendment. (See Exhibit H, at 110 -

125; 127-147). The appeal was denied on December 16, 2008. In its opinion, the appellate court did not address either the jurisdictional challenges or the due process concerns raised by the petitioner. See *Glavinskas v. William L. Dawson Nursing Center, Inc.*, 392 Ill. App. 3d 347, 912 N.E. 2d 675 (1st Dist. 2008). Instead the court ruled on the merits, finding that the trial court had properly voided the settlement and dismissal order.

The petitioner filed a petition for rehearing on January 6, 2009, which argued that the appellate court had erroneously failed to address the petitioner's jurisdictional arguments and that the court had incorrectly ruled that the settlement agreement and dismissal order were void. (See Exhibit J at 173 - 177) The petition was denied on July 13, 2009.

The petitioner then filed a petition for leave to appeal to the Illinois Supreme Court on August 17, 2009. (See Exhibit K). The petitioner once again argued that its due process rights were violated by the lower courts' failure to address the jurisdictional arguments raised below and by the lower courts' reversal of a valid and binding settlement agreement:

> ...the defendant [petitioner] has been grievously deprived of substantive rights by the handling of this case in the underlying courts: First by the trial court, in un-doing a valid and binding settlement, and then by the appellate court, in ignoring the jurisdictional issues the defendant raised in its appeal....
>
> The defendant raised an argument that must be addressed by the courts, which has not been addressed by the courts. Such amounts to a violation of the defendant's due process rights: the defendant has been deprived of a full hearing on jurisdictional arguments that cannot be waived....

> A disabled plaintiff is deserving of the protection of the courts, but a defendant is equally deserving of the rights afforded to it under the Code of Civil Procedure and the Constitution. Based on the lower courts' rulings, a defendant can never reasonably expect finality or closure to a case, because the courts will allow a ward every opportunity, even after jurisdiction has been lost, to re-open and re-litigate his case. (See Exhibit K at 196 – 198 (emphasis in original)).

The petition was denied on November 25, 2009.

REASONS FOR GRANTING THE WRIT

A. The Petitioner's Due Process Rights Were Violated By the Lower Courts' Failure to Address Its Jurisdictional Challenges

The petitioner has raised its jurisdictional challenges at every level of appeal; yet, to date, no court has addressed the petitioner's arguments that the trial court lacked jurisdiction to take any action

on the respondent's 2-1401 petition.. Therefore, this Court should grant the petitioner's writ pursuant to Rule 10(b): The Illinois courts have decided "an important federal question in a way that conflicts with relevant decisions of this Court," by failing to address jurisdictional challenges raised by the petitioner, which this Court repeatedly has held may not be waived.

As this Court wrote in *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-95 (1998):

> On every writ of error or appeal, the first and fundamental question is that of jurisdiction, first, of this court, and then of the court from which the record comes....Every federal appellate court has a special obligation to 'satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review,'....'And if the record discloses that the lower court was without jurisdiction this court will notice the defect....[When the lower federal court] lacks jurisdiction, we have jurisdiction on appeal, not of the

> merits but merely for the purpose of correcting the error of the lower court in entertaining the suit.'.

Similarly, this Court has stated: "No judgment of a court is due process of law if rendered without jurisdiction in the court or without notice to the party." *Scott v. McNeal*, 154 U.S. 34, 46 (1894).

In a more recent decision, this Court provided a lengthier discussion of the long-standing nature of this law:

> The proposition that the judgment of a court lacking jurisdiction is void traces back to the English Year Book [citation omitted]....American courts invalidated, or denied recognition to, judgments that violated this common-law principle long before the Fourteenth Amendment was adopted. [citations omitted.] In *Pennoyer v. Neff*, 95 U.S. 714, 732 (1878), we announced that the judgment of a court lacking personal jurisdiction violated the Due Process Clause of the Fourteenth Amendment as well.

Burnham v. Superior Court of Cal., 495 U.S. 604, 608- 609 (1990). And in *Old Wayne Mut. Life Asso. v. McDonough*, 204 U.S. 8, 15 (1907), this Court held:

> It is a rule as old as the law... that no one shall be personally bound until he has had his day in court, by which is meant, until he...*has been afforded an opportunity to be heard.* Judgment without such...opportunity wants all the attributes of a judicial determination...(emphasis in original).

Given that it violates due process for a court lacking jurisdiction to render a final judgment (or to render one void), it follows that a court's failure to address the jurisdictional challenges raised by a party also constitutes a violation of due process. At the very least, a court should be required to acknowledge the jurisdictional issues raised and state its ruling on same. Whether the appellate court even considered the petitioner's arguments is entirely absent from the record. See *Glavinskas,*

392 Ill. App. 3d 347, 912 N.E. 2d 675 (1st Dist. 2008). The appellate court's opinion was solely decided on the merits. It did not address the two jurisdictional arguments raised by the petitioner, which should have precluded the appellate court from hearing the case. By ignoring the jurisdictional challenges in this case, the petitioner's "opportunity to be heard" on a fundamental issue was withheld. Therefore, the courts' failure to address the jurisdictional arguments violates the petitioner's due process rights.

Pursuant to Illinois law, the only way for a party to vacate a final judgment after 30 days is to comply with Section 2-1401 of the Illinois Code of Civil Procedure ("2-1401 petition"). Hearings on such petitions are considered a new proceeding, separate and apart from the underlying matter the

petition seeks to re-open. *See* 735 ILCS 5/2-1401(b) ("The petition must be filed in the same proceeding in which the order or judgment was entered but is not a continuation thereof.") Therefore, the court must establish that it has jurisdiction to hear the petition pursuant to the statute. Furthermore, petitions failing to comply with the statutory requirements are subject to dismissal for want of legal and factual sufficiency. *People v. Vincent*, 226 Ill.2d 1, 8, 871 N.E. 2d 17, 23 (2007).

The petitioner argued that the trial court did not have jurisdiction to hear the plaintiff's successive 2-1401 petitions to vacate the December 1, 2005, dismissal order in the underlying case, because repeated post-judgment motions pursuant to section 2-1401 are prohibited (*see Village of Glenview v. Buschelman*, 296 Ill.App.3d 35, 39, 693

N.E.2d 1242, 1245 (1st Dist 1998))[4], and because the plaintiff's twice amended 2-1401 petitions failed to satisfy the necessary requirements for filing such petitions. Amended petitions are allowed only in cases where the petition:

> (1) [Is] authorized by an order that grants petitioner leave to amend the earlier petition.
> (2) [Is] submitted for the purpose of curing defects in the earlier petition or for alleging grounds that have not and could not have been previously adjudicated and
> (3) [Is] filed within 30 days after the order granting leave to amend.

See Buschelman, 296 Ill.App.3d at 40. Where a party's amended 2-1401 petition does not satisfy

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[4] *Buschelman* was criticized recently by a Second District Illinois appellate court case, *People v. Walker*, 2009 Ill.App. LEXIS 1118, 918 N.E.2d 1260 (2nd Dist. 2009), however, this case is not controlling case law in this matter.

these criteria, the trial court lacks proper jurisdiction to hear the amended petition. *Id.*

The respondent filed not one, but three 2-1401 petitions before finding a presiding judge who would grant his petition: one original petition and two amended petitions. The respondent argued that the respondent's twice amended 2-1401 petitions failed to satisfy the above criteria for filing such petitions. Further, the respondent's last 2-1401 petition, which was granted, still failed to meet the statutory requirements of such petitions – namely, it was not supported by evidentiary hearing or affidavit. See 735 ILCS 5/2-1401(b).

As such, the trial court did not have jurisdiction to hear the respondent's last amended 2-1401 petition, as the court only has jurisdiction to hear such petitions pursuant to statute. In other

words, because the respondent's relief was purely statutory in nature, his failure to meet the statutory requirements stripped the court of its jurisdiction to hear the petition. See *Buschelman*, 296 Ill.App. at 39.

Second, and in the alternative, the petitioner argued that the trial court's October 31, 2006, order dismissing the plaintiff's first 2-1401 petition with prejudice was the final order of judgment on the petition, and therefore, the dismissal order in the underlying case remained undisturbed. The October 31, 2006, order dismissing the plaintiff's first 2-1401 petition was later modified on November 27, 2006, changing the petition from being dismissed with prejudice to being stricken. (See Exhibits C, D). Subsequently, the November 27, 2006, order was vacated. (See Exhibit E). Consequently, the October

31, 2006, order was no longer modified, and the case remained dismissed with prejudice.

Based on both of the foregoing arguments, the trial court never had jurisdiction to hear the plaintiff's final 2-1401 petition, both because the plaintiff should not have been allowed to file his last 2-1401 petition on December 20, 2006, and/or alternatively, because the underlying case and petition remained dismissed with prejudice as of October 31, 2006. The appellate court did not address either of these jurisdictional arguments, and the Illinois Supreme Court denied the petitioner's petition for leave to appeal. Therefore, the petitioner has been denied due process of law by the lower court's failure to address these jurisdictional challenges.

Respectfully submitted,

BUSSE, BUSSE, & GRASSÉ, P.C.
Edward K. Grassé
Attorney for Defendant – Petitioner,
William L. Dawson Nursing Center, Inc.

APPENDIX

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***Glavinskas v. William L. Dawson Nursing Center, Inc.*, 392 Ill. App. 3d 347, 912 N.E. 2d 675 (1st Dist. 2008)**

Justice SOUTH delivered the opinion of the court:

This appeal arises from the circuit court's grant of plaintiff's amended petition to vacate pursuant to section 2-1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 2006)). For the reasons set forth below, we affirm.

BACKGROUND

A history of the case as set forth in the circuit court's written order established the following: On October 30, 1999, Derek Thomas was severely injured, rendering him both mentally and physically disabled, when he was a passenger in a William L. Dawson Nursing Center (Dawson Nursing Center) (defendant) vehicle that was being driven with permission by its employee, Robert Martin. As a result of the accident, Thomas was taken to Christ Hospital, where he underwent numerous surgeries. After plaintiff's treatments were finished at Christ Hospital, he was transferred to the Dawson Nursing Center.

On July 20, 2000, the probate division of the circuit court of Cook County adjudicated Thomas a mentally disabled person and appointed *349 his 19-year-old half brother, Michael Poland, plenary guardian. On April 15, 2001, Poland, as guardian of the person and estate of Thomas, filed a cause of action against Dawson Nursing Center. Poland hired attorney Sheldon Belofsky to handle the case. Belofsky proceeded with the prosecution of the case, but on June 21, 2002, Judge Michael Hogan barred witnesses based upon Belofsky's failure to answer

discovery and dismissed the case. Those orders were vacated later that month. On January 7, 2003, count II of plaintiff's amended complaint was dismissed without prejudice.

In March 2003, Poland testified at a deposition that in 2001 he was convicted of a felony for stealing money from Thomas in 2000, for which he received a sentence in excess of one year. It is unclear from the deposition if he was sentenced to the penitentiary or received probation. Both Belofsky and defendant's counsel, William Busse, were present at Poland's deposition.

At the close of discovery, Dawson Nursing Center filed a motion for summary judgment maintaining there was no evidence that Martin was acting within the course and scope of his employment with defendant at the time of the accident. Dawson Nursing Center also filed a motion to bar the disclosure of any expert witnesses. On November 10, 2003, Judge Lynn M. Egan barred Thomas from testifying on his own behalf, noting in her order that plaintiff had not appeared at the hearing on the motion or filed any written objection to it. According to defendant***190**677 a pretrial conference was held on October 12, 2004, before Judge Barbara McDonald, at which time defendant agreed to pay $175,000 in an annuity in exchange for dismissal of the case. The only support for defendant's assertion in the record is a letter sent from attorney Edward Grasse (one of defendant's attorneys) to Belofsky. No testimony was presented at the hearing and no affidavit from Judge McDonald or defense counsel was submitted to inform the circuit court of what transpired at the pretrial conference.

A year passed and no action was taken on the case until defendant brought a motion in both the law division and probate division to compel plaintiff to approve the settlement. The case proceeded simultaneously in both the law and probate Divisions. On October 18, 2005, Judge Robert Lopez Cepero in the law division granted defendant's motion to compel plaintiff to approve the settlement, instructing plaintiff's counsel to "seek to approve the settlement reached between the parties before October 21, 2005," or "this Court will make its own motion to approve the settlement." No evidence was provided to the circuit court that Belofsky ever communicated to Thomas or Poland that an offer to settle the case had been made by defendant.

*350 Once the probate division was notified that settlement discussions concerning Thomas' personal injury case were being held, Judge James G. Riley appointed attorney Linda Bryceland as guardian ad litem (GAL) for Thomas on October 24, 2005. The probate division instructed Bryceland to examine the reasonableness of the proposed settlement between Thomas and Dawson Nursing Center. The order of the probate division specifically empowered Bryceland to investigate why nothing had been done about the Illinois Department of Public Aid (Public Aid) lien of $272,000, which Thomas owed to defendant nursing center. That lien greatly exceeded the offer of $175,000. Bryceland was to investigate the possibility of adjudicating the Public Aid lien against the disabled person for $272, 000 and review Poland's performance on behalf of Thomas.

According to defense counsel Grasse, on December 1, 2005, he was the only person who was present when Judge Lopez Cepero of the law division signed an order that the proposed settlement agreement between plaintiff and defendant "is proper and hereby approves the settlement" and dismissed plaintiff's case with prejudice. On December 15, 2005, Judge James G. Riley of the probate division entered an order directing GAL Bryceland to file a motion to vacate the order entered in the law division that approved the settlement. On December 31, 2005, Bryceland filed a petition in the law division to intervene and vacate the December 1, 2005, dismissal order. On February 10, 2006, Judge Riley of the probate division suspended the powers of Poland as Thomas' guardian and appointed John Carr as temporary guardian of the person and estate of Derek Thomas. On April 18, 2006, Judge Riley granted Carr's petition to discharge Belofsky as counsel for the guardian, and Carr hired the Clifford Law Offices to represent the disabled plaintiff's estate. On May 4, 2006, Judge Lopez Cepero denied Bryceland's motion to intervene.

On October 18, 2006, Judge Riley removed Poland as guardian for Thomas due to his felony conviction in February 2001 for stealing from Thomas while he was his guardian and for failing to follow the rules and regulations of the probate division governing guardianship. On October 26, 2006, the probate division entered an order finding that the settlement of $175,000 was unconscionable and rejected it. The probate division directed the temporary ***191**678 guardian, Carr, to file a motion to reconsider the dismissal order before

Judge Lopez Cepero. On October 31, 2006, Judge Lopez Cepero entered a written order denying the section 2-1401 petition with prejudice. On November 27, 2006, when plaintiff's motion to reconsider was before him, Judge Lopez Cepero vacated his previous order but entered an order striking plaintiff's section 2-1401 petition. Judge Lopez Cepero then recused himself from further handling of the case.

*351 On November 29, 2006, Judge William D. Maddux, presiding judge of the law division, vacated Judge Lopez Cepero's October 31, 2006, ruling striking plaintiff's section 2-1401 petition and set a new briefing schedule. Defendant then filed a motion for substitution of judge as a right from Judge Maddux, and the case was transferred to Judge Deborah Dooling on April 2, 2007.

Judge Dooling found that plaintiff's petition raised a meritorious claim for relief from the settlement and dismissal orders because plaintiff had been adjudged mentally disabled, and there was no evidence he consented to the settlement through either his attorney or guardian. As to the due diligence in the original action requirement, Judge Dooling noted that plaintiff's then guardian, Poland, had been convicted of a felony, and his then attorney, Belofsky, did little to further the prosecution of Thomas' case. The court further noted that defense counsel failed to inform the court of the guardian's actions and the Public Aid lien when he was the only one at the hearing who possessed knowledge that was relevant to its consideration. Finally, the court noted that trial judges have the responsibility of protecting the best interests of a mentally disabled

person and cannot approve a settlement and enter a dismissal order where the plaintiff's rights are not adequately protected by either his guardian or attorney, and defense counsel withheld information that would have affected whether the court approved the settlement. The court concluded that Thomas was excused from strict compliance with the section 2-1401's requirement of due diligence in the original action since he was not accountable for the negligence of his representation and found that enforcement of the order would be unjust, unfair, and unconscionable. As to the due diligence requirement in filing the section 2-1401 petition, the court found that the passage of seven months between the entry of the dismissal and filing of a section 2-1401 petition was reasonably diligent under the totality of circumstances surrounding the entry of judgment and the conduct of the litigants and their attorneys. The court specifically noted the "extraordinary efforts" taken by the GAL, the temporary guardian, and Jeffrey Kroll of the Clifford Law Offices to ensure the protection of Thomas. Based on their actions, the court found that plaintiff established due diligence in filing the section 2-1401 petition. Having found that plaintiff satisfied all three requirements for a section 2-1401 petition, the court concluded that plaintiff had met his burden by a preponderance of the evidence and vacated the December 1, 2005, dismissal order.

The court further noted that the December 1, 2005, dismissal order was unenforceable pursuant to the holding in Villalobos v. Cicero School District 99, 362 Ill.App.3d 704, 711, 298 Ill.Dec. 944, 841 N.E.2d 87 (2005), because it *352 failed to comply with Cook

County Circuit Court Rules 6.4 (effective January 1, 2001) and 12.15(c) (effective September 3, 1996) governing the settlement of disabled persons' personal injury cases in the law and probate divisions. The court found that Judge Lopez Cepero did not indicate in the order that he found the settlement to be fair and reasonable, the order did not provide that ***192**679 the settlement monies would only be paid to the representative of the disabled person appointed by the probate division, and the order did not comply with any of the procedures required by the circuit court rules. Because Judge Riley of the probate division, in compliance with the procedures set forth in the circuit court rules, rejected the proposed settlement that had been approved in the law division, and applied the logic and reasoning of Villalobos, he found that the dismissal order was unenforceable unless and until it was approved by the probate division, and the procedures set forth in the circuit court rules governing settlement of disabled persons' personal injury cases were followed. Thereafter, the court granted plaintiff's section 2-1401 petition and vacated the December 1, 2005, dismissal order. This appeal followed.

ANALYSIS

The sole issue presented to this court is whether the circuit court properly granted plaintiff's successive section 2-1401 (735 ILCS 5/2-1401 (West 2006)) petition.

[1] Section 2-1401 of the Code outlines the statutory procedures by which final orders and judgments can be vacated by the circuit court more than 30 days following

their entry, provided that the petition to vacate is filed within two years of entry of that judgment or order. S.C. Vaughan Oil Co. v. Caldwell, Troutt & Alexander, 299 Ill.App.3d 892, 897, 234 Ill.Dec. 262, 702 N.E.2d 602 (1998). Section 2-1401 requires that the petition be filed in the same proceeding in which the order or judgment was entered, but it is not a continuation of the original action. 735 ILCS 5/2-1401(b) (West 2006). Although a section 2-1401 petition is ordinarily used to bring facts to the attention of the circuit court that, if known at the time of judgment, would have precluded its entry, it may also be used to challenge a purportedly defective judgment for legal reasons. Paul v. Gerald Adelman & Associates, Ltd., 223 Ill.2d 85, 94, 306 Ill.Dec. 556, 858 N.E.2d 1 (2006).

A proceeding under section 2-1401 is commenced by the filing of a petition "supported by affidavit or other appropriate showing as to matters not of record." 735 ILCS 5/2-1401(b) (West 2006). The petition must set forth allegations of a meritorious claim or defense; due diligence in presenting the claim or defense to the circuit court in the original action; and due diligence in filing the section 2-1401 petition. Paul, 223 Ill.2d at 94, 306 Ill.Dec. 556, 858 N.E.2d 1. However, where, as in this case, a petition*353 seeks to vacate a final judgment as being void (735 ILCS 5/2-1401(f) (West 2006)), the allegations of voidness " 'substitute[ ] for and negate[ ] the need to allege a meritorious defense and due diligence.' " People v. Vincent, 226 Ill.2d 1, 7 n. 1, 312 Ill.Dec. 617, 871 N.E.2d 17 (2007), quoting Sarkissian v. Chicago Board of Education, 201 Ill.2d 95, 104, 267 Ill.Dec. 58, 776 N.E.2d 195 (2002).

[2][3][4] A section 2-1401 petition invokes the equitable powers of the circuit court in that the power to set aside a judgment, and thus allow a litigant to have his or her day in court, is based on substantial principles of right and wrong and is to be exercised for the prevention of injury and the furtherance of justice. Paul, 223 Ill.2d at 95, 306 Ill.Dec. 556, 858 N.E.2d 1, citing Smith v. Airoom, Inc., 114 Ill.2d 209, 225, 102 Ill.Dec. 368, 499 N.E.2d 1381 (1986); Diner's Club, Inc. v. Gronwald, 43 Ill.App.3d 164, 168, 1 Ill.Dec. 928, 356 N.E.2d 1261 (1976). As to the requirement of due diligence, justice and good conscience may require that a judgment be vacated even though there may have been a lack of due diligence. Diner's Club, 43 Ill.App.3d at 168, 1 Ill.Dec. 928, 356 N.E.2d 1261. The proof necessary to sustain a section 2-1401 ***193**680 petition is a preponderance of the evidence. Paul, 223 Ill.2d at 95, 306 Ill.Dec. 556, 858 N.E.2d 1. Whether a section 2-1401 petition should be granted lies within the sound discretion of the circuit court, depending on the facts and equities presented, and its ruling will not be disturbed absent an abuse of discretion. Airoom, 114 Ill.2d at 221, 102 Ill.Dec. 368, 499 N.E.2d 1381. With these principles in mind, we consider the issue raised in this appeal.

Defendant contends that the circuit court abused its discretion in granting plaintiff's amended section 2-1401 petition because plaintiff did not have a meritorious section 2-1401 claim and did not exercise due diligence in the underlying action or in the section 2-1401 petition. We disagree.

[5] It is clear from the record that plaintiff had a meritorious section 2-1401 claim. It is undisputed that Thomas was adjudged incompetent in the probate division and that Poland was appointed his guardian and hired Belofsky to prosecute a personal injury case on Thomas' behalf against Dawson Medical Center. It is also undisputed that neither Poland nor Belofsky acted within Thomas' best interests in handling this matter. Further, it is undisputed that neither Poland nor Belofsky ever approved the settlement or was present in court when the dismissal order was entered. Because an incompetent person can only act through his representatives, and Thomas' representatives failed in their representation of his interests, we find that a meritorious claim for section 2-1401 relief exists, and the circuit court did not abuse its discretion in so finding. As additional support for the existence of a meritorious claim for section 2-1401 relief, we agree with the trial court that the December 1, 2005, order was unenforceable since it did not comply with the procedures outlined in the circuit court rules in accordance with the holding of Villalobos v. Cicero School District 99, 362 Ill.App.3d 704, 712, 298 Ill.Dec. 944, 841 N.E.2d 87 (2005).

[6]*354 Turning to whether due diligence was exercised in the handling of the underlying action, it is undisputed that attorney Belofsky, who was hired by Poland, was negligent and dilatory in his prosecution of the personal injury case. However, it is equally undisputed that courts have a responsibility to protect the interests of mentally disabled persons, and we conclude that Thomas is not accountable for the negligence of his representatives. We

agree with the circuit court that it would be unfair and unconscionable to find otherwise.

[7] Finally, we find that plaintiff exercised due diligence in the filing of the section 2-1401 petition as evidenced by the record. Upon being apprised of the settlement that had been approved in the law division, and upon learning that Poland was a convicted felon, Judge Riley in the probate division immediately appointed a GAL to investigate the settlement and its fairness, as well as the outstanding Public Aid lien against Thomas. The GAL, Bryceland, filed a motion to intervene, which was denied by the judge in the law division. Judge Riley removed Poland and appointed a temporary guardian, who obtained leave to fire Belofsky and retain new counsel, who immediately filed a section 2-1401 petition. Contrary to defendant's contention, we fail to see how this expeditious conduct resulted in a lack of due diligence in filing the section 2-1401 petition given the particular circumstance of the instant case. As such, we conclude that plaintiff exercised due diligence in filing the section 2-1401 petition, and the circuit court did not abuse its discretion in so finding. We conclude that the trial court properly granted plaintiff's section ***194**681 2-1401 petition for relief and agree that to hold otherwise would be unfair, unconscionable, and unjust.

For the foregoing reasons, we affirm the judgment of the circuit court.

Affirmed.

KARNEZIS, P.J., and HOFFMAN, J., concur.

November 25, 2009, Illinois Supreme Court order denying Defendant's petition for leave to appeal

109008

SUPREME COURT OF ILLINOIS

CLERK OF THE COURT

SUPREME COURT BUILDING

SPRINGFIELD, ILLINOIS 62701

(217)782-2035

November 25, 2009

Mr. Edward K. Grasse

Busse, Busse & Grasse P.C.

20 North Wacker Drive

Suite 1860

Chicago, IL 60606-2905

No. 109008 - Eduard Adam Glavinskas, etc., respondent, v. William L. Dawson Nursing Center, Inc., petitioner. Leave to appeal, Appellate Court, First District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on December 30, 2009.

July 13, 2009, Illinois Appellate Court Order denying Defendant's petition for Rehearing

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS COUNTY DEPARTMENT, LAW DIVISION

EDUARD GLAVINSKAS as guardian of the Estate of Derek J. Thomas, Disabled Person,	)
	) No. 1-07-2122
Plaintiff-Appellee,	)
v.	)
WILLIAM L. DAWSON NURSING CENTER, INC.,	)
Defendant-Appellant	)

ORDER

This cause coming to be heard on defendant-appellant's petition for rehearing, and the court being fully advised in the premises:

IT IS HEREBY ORDERED that the petition for rehearing is denied.

/s Leslie South

Justice

ORDER ENTERED /s

JULY 13, 2009

Appellate Court,

First District

Justice

/s

Justice

Exhibit A

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

Poland	)
	)
v.	) No. 01 L 4011
	)
Dawson	)

ORDER

This cause coming to be heard for status, due notice being given, the court being fully advised, it is hereby ordered that:

The court having fully reviewed the file and facts of this case, the judge hereby finds that the settlement entered into of $175,000 between the Estate of Derek Thomas and William L. Dawson Nursing Home is proper and hereby approves the settlement. This matter is dismissed with prejudice.

ENTERED: Judge Robert Lopez Cepero
Dated: December 01 2005
Circuit Court-1627

Atty. No.: 91714
Name: Busse & Busse
Atty. for: Defendant
Address: 20 N. Wacker
City/State/Zip: Chicago, IL 60606
Telephone: 312-750-1212

Exhibit B

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

John Carr, as guardian of the person and estate of Derek Thomas, a disabled adult)

v.) No. 01 L 401

William L. Dawson)

ORDER

This cause coming to be heard on plaintiff's emergency motion to amend the 5/2-1401 motion to vacate and supplement the record. Due notice been given, and the court advised in the premises:

It is hereby ordered:

1. Plaintiff's motion is denied;
2. The hearing date of August 24, 2006 is stricken;
3. Plaintiff is given leave to filet is reply by or on Sept. 6, 2006; and
4. A Hearing on plaintiff's motion to vacate is set for Sept. 13, 2006 at 10:55 a.m. in Court Room 2205.

ENTERED: Judge Robert Lopez Cepero
Dated: August 23, 2006
Circuit Court-1627

Atty. No.: 32640

Name: Clifford Law

Atty. for: Plaintiff
Address: 120 N. LaSalle
City/State/Zip: Chicago
Telephone: 312-899-9090

Exhibit C

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

John Carr, as guardian of the person and estate of Derek Thomas, a disabled adult)
)
)
)
v.) No. 01 L 401
)
William L. Dawson)

WRITTEN ORDER

735 ILCS 5/2-1401(b) states as follows: "[t]he petition must be filed in the same proceeding in which the order or judgment was entered but is not a continuation thereof. The petition must be supported by affidavit or other appropriate showing as to matters not of record. All parties to the petition shall be notified as provided by the rule." (emphasis added)

The language of the statute is clear thereby eliminating the exercise of any discretion by this court. On September 19, 2006 plaintiff sought to vacate this court's prior order approving a $175,000 settlement on plaintiff's behalf pursuant to 2-1401. The court instructed both parties that it had before it insufficient evidence upon which it could base an opinion as to the diligence of Mr. Sheldon Belofsky, plaintiff s initial counsel. Plaintiff -over the vehement objection of the defendant- was granted 30 days to either produce the affidavit of plaintiff or Mr. Sheldon Belofsky. The court deemed this

evidence procedurally required and necessary to its due diligence inquiry.

Plaintiff has failed to produce either of the aforementioned. Therefore, pursuant to 2- 1401(b) this court must deny plaintiffs motion because of plaintiff's failure to comply with the statutory requirements of 2-140 I (b).

WHEREFORE, IT IS HEREBY ORDERED; Plaintiff's Motion to Vacate pursuant to 2- 1401 is denied with prejudice. The Court finds not just reason for delaying either enforcement or appeal or both.

ENTERED: Judge Robert Lopez Cepero
Dated: OCT 31 2006
Circuit Court-1627

Exhibit D

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

John Carr, as guardian of the person and estate of Derek Thomas, a disabled adult)
)
)
)
v.) No. 01 L 401
)
William L. Dawson)

ORDER

This cause coming to be heard on plaintiff's motion to reconsider, due notice being given, it is hereby ordered that:

1. In open court, the court hereby corrects its October 31, 2006, order, nunc pro tunc, from dismissal w/prejudice to plaintiff's motion being stricken, in accord w/court's oral ruling;
2. On the court's own motion, Judge Cepero hereby recuses himself from further handling of this case;
3. Plaintiff's motion to reconsider is transferred to Room 2005, presiding judge for reassignment.

ENTERED: Judge Robert Lopez Cepero
Dated: Nov 27 2006
Circuit Court-1627

Atty. No.: 91714
Name: Busse & Busse
Atty. for: Defendant
Address: 20 N. Wacker
City/State/Zip: Chicago, IL 60606

Telephone: 312-750-1212

Exhibit E

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

John Carr, as guardian of the person and estate of Derek Thomas, a disabled adult)
)
)
)
v.) No. 01 L 401
)
William L. Dawson)

ORDER

This cause coming to be heard on plaintiff's emergency motion for reassignment, due notice have been given and argument made it is hereby ordered:

1. The order of Judge Lopez Cepero striking plaintiff's 2-1401 petition of October 31, 2006 is vacated;
2. David Novoselsky of Novoselsky Law Office are granted leave to file an additional appearance as co-counsel for the plaintiff;
3. The case is reassigned to Judge Maddux in Room 2005.
3. Plaintiff's motion to reconsider is transferred to Room 2005, presiding judge for reassignment.

ENTERED: Judge William D. Maddux-1559
Dated: 11-29-06

Atty. No.: 32640
Name: Jeff Kroll
Atty. for: Plaintiff
Address: 120 N. LaSalle
City/State/Zip: Chicago, IL 60600

Telephone: 312-899-9090

Exhibit F

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

John Carr, as guardian of the person and estate of Derek Thomas, a disabled adult)
)
)
)
v.) No. 01 L 401
)
William L. Dawson)

ORDER SETTING HEARING

This cause coming before the Court on plaintiff's emergency motion for reassignment and 1401 petition due notice having been given and this Court being fully advised in the premises,
plaintiff shall refile 1401 by December 20, 2006.

IT IS HEREBY ORDERED:

1. Any Response shall be filed by 1/24/07;
2. Any Reply shall filed by 2/7/07;
3. This Motion shall be heard on 2/22/07 at 2:00 p.m. in Room 2205, Richard J. Daley Center, before Judge Maddux;
4. The movant will provide the Court with a complete set of courtesy copies of all relevant pleadings and memoranda, including all relevant complaints if consolidation or dismissal is sought. Courtesy copies are due by 4:00 p.m. at least seven COURT days in advance of the hearing date, or your hearing will be stricken. Movant must notify the court, by letter, seven court days in advance of the hearing, if the party opposing the motion is not

filing a response and/or has no opposition to the motion.

5. Motions and/or memoranda filed in support of a motion cannot exceed a combined total of fifteen double-spaced pages in length, without leave of court.

6. Courtesy copies are due: 2/9/07, and should be delivered directly to Judge Maddux's chambers.

ENTERED: Judge William D. Maddux-1559
Dated: 11-29-06

Atty. No.: 91714
Name: Busse & Busse
Atty. for: Defendant
Address: 20 N. Wacker
City/State/Zip: Chicago, IL 60606
Telephone: 312-750-1212

Exhibit G

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS COUNTY DEPARTMENT, LAW DIVISION

EDUARD GLAVINSKAS as guardian of the Estate of Derek J. Thomas, Disabled Person,	)
Plaintiff,	) No. 07 L 04011
v.	)
WILLIAM L. DAWSON NURSING CENTER, INC.,	)
Defendant-Appellant	)Honorable)Deborah Mary)Dooling,)Judge Presiding

This case comes on the call on plaintiffs Amended Petition to Vacate the Order of December 1, 2005, pursuant to section 2-1401 of the Illinois Code of Civil Procedure (735 ILCS 5/2-1401 (West 20(2)), or to request to vacate the same order because it was not a final order. On December 1,

2005, Judge Robert Lopez Cepero of the Law Division entered an order dismissing with prejudice plaintiff Derek Thomas' case against defendant William L. Dawson Nursing Center. On June 18, 2007, an evidentiary hearing was held on plaintiffs motion. Counsel for both parties had attempted to obtain the appearance and testimony of plaintiffs prior counsel. Sheldon Belofsky. However, Sheldon Belofsky did not appear. His son, David Bclofsky, is also an attorney and appeared and informed the Court that his father, Sheldon Belofsky, is presently in the intensive care unit at Northwestern Memorial Hospital and unable to appear in court. Following this disclosure, counsel for plaintiff and defendant chose to stand on their written submissions and present arguments. After careful consideration of all written submissions and oral arguments, this Court vacates the dismissal order of December 1,2005. A

recitation of the history of the ease relevant to the Court's ruling follows.

BACKGROUND

On October 30, 1999, Derek Thomas was severely injured, rendering him both mentally and physically disabled, when he was a passenger in a William L. Dawson Nursing Center vehicle driven by its employee, Robert Martin, As a result of the accident, plaintiff was taken to Christ Hospital where be underwent numerous surgeries, After plaintiff finished his treatment at Christ Hospital, he was transferred to the defendant William L. Dawson Nursing Center. On July 20, 2000, the Probate Division of the Circuit Court of Cook County adjudicated Derek Thomas a mentally disabled person and appointed his then 19-year-old

half-brother, Michael Poland plenary guardian. On April 15, 2001, Michael Poland, as guardian of the person and estate of Derek Thomas, filed a cause of action against the William L. Dawson Nursing Center. Michael Poland hired attorney Sheldon Belofsky to handle the case. Sheldon Belofsky proceeded with the prosecution of the case and on June 21, 2002, Judge Michael Hogan barred witnesses based on Sheldon Belofsky's failure to answer discovery and then dismissed the case. Later that same month, Judge Hogan vacated those orders. On January 7, 2003, Judge Hogan dismissed Count II of plaintiffs amended complaint without prejudice.

In March 2003, Derek Thomas' guardian, Michael Poland, testified at a deposition that in 200l he was convicted of a felony for stealing money from

Derek Thomas in 2000, for which he received a sentence in excess of one year. It is unclear from the deposition, if Michael Poland was sentenced to the penitentiary or received probation. Both Sheldon Belofsky and William Busse, counsel for the defendant, were present at Michael Poland's deposition.

On November 10, 2003, Judge Lynn M. Egan barred Derek Thomas from testifying on his own behalf, noting in her order that plaintiff had not appeared at the hearing on the motion or filed any written objection to the motion. Following this ruling, defendant asserts that a pretrial conference was held on October 12, 2004, before Judge Barbara McDonald, at which defendant agreed to pay $175,000.00 in an annuity in exchange for dismissal of the case. The only support for defendant's

assertion is a letter sent from Edward Grasse to Sheldon Bclofsky. No testimony was presented at the hearing and no affidavit from Judge McDonald nor defense counsel was submitted to inform the Court of what transpired at the pre-trial conference.

A year passed and no action was taken on the case until defendant brought a motion in both the Law Division and the Probate Division to compel plaintiff to approve the settlement. The case proceeded simultaneously in both the Law and Probate Divisions. On October 18, 2005, Judge Robert Lopez Cepero granted defendant's motion to compel plaintiff to approve the settlement, instructing plaintiff's counsel to "seek to approve the settlement reached between the parties before October 21, 2(0)" or "this Court will make it's own motion to approve the settlement." No evidence has

been provided to the Court that Sheldon Belofsky ever communicated to Derek Thomas or Michael Poland that an offer to settle the case had been made by defendant. Once the Probate Division was notified that settlement discussions concerning Derek Thomas' personal injury case were being held, Judge James G, Riley appointed attorney Linda Bryceland as Guardian ad litem ("GAL") for Derek Thomas on October 24, 2005, The Probate Division instructed Linda Bryceland to examine the reasonableness of the proposed settlement between Derek Thomas and the William L Dawson Nursing Center, The order of the Probate Division specifically empowered Linda Bryceland to investigate why nothing was done about the Illinois Department of Public Aid lien of $272,000'00 that Derek Thomas owed to the defendant nursing center, The lien greatly exceeded the offer of

$175,000.00. Linda Bryceland was to investigate the possibility of adjudicating the Illinois Department of Public Aid lien against the disabled person for $272,000.00 and to review Michael Poland's performance as guardian of Derek Thomas.

On December 1, 2005, according to defense counsel, Edward Grasse, he was the only one present when Judge Lopez Cepero of the Law Division signed an order that the proposed settlement agreement between plaintiff and defendant "is proper and hereby approves the settlement" and dismissed plaintiffs case with prejudice, On December 15,2005, Judge James G. Riley of the Probate Division entered an order directing the Guardian ad litem Linda Bryceland to file a motion to vacate the order entered in the Law Division approving the settlement between Michael

Poland as guardian and the William L. Dawson Nursing Center. On December 31, 2005, Linda Bryceland filed a petition in the Law Division to intervene and vacate the December l , 2005 dismissal order. On February] 0, 2006, Judge Riley of the Pro hate Division suspended the powers of Michael Poland as guardian of Derek Thomas and appointed John Carr as temporary guardian of the Person and Estate of Derek Thomas. On April 18, 2006, Judge Riley granted John Carr's petition to discharge Sheldon Belofsky as counsel for the guardian. John Carr then hired the Clifford Law Offices to represent the disabled plaintiff, Derek Thomas. On May 4, 2006, Judge Lopez Cepero denied Linda Bryceland's motion to intervene.

On October 18, 2006, Judge Riley removed Michael Poland as guardian for Derek Thomas

because of his felony conviction in February 2001 for stealing from Derek Thomas while he was his guardian and for failing to follow the rules and regulations of the Probate Division governing guardianship. On October 26, 2006, the Probate Division entered an order finding that the settlement of$175,000.00 was unconscionable, and rejected that settlement. The Probate Division directed the temporary guardian, John Carr, to file a motion to reconsider the entry of the dismissal order before Judge Lopez Cepero. On October 31, 2006, Judge Lopez Cepero entered a written order denying the section 2-1401 petition with prejudice. On November 27, 2006, when plaintiffs Motion to Reconsider was before Judge Lopez Cepero, Judge Lopez Cepero vacated his previous order denying the 2-1401 petition with prejudice and entered an order striking plaintiffs 2-1401 petition. Judge

Lopez Cepero then recused himself from further handling of the case.

On November 29,2006, Judge William D. Maddux, Presiding Judge of the Law Division, vacated Judge Lopez Cepero's October 31, 2006 ruling striking plaintiffs 2-1401 petition and set a new briefing schedule. Defendant then filed a Motion for Substitution of Judge as of Right from Judge Maddux. Consequently, on April 2, 2007, the ease was transferred to this Court to resolve all issues.

ANALYSIS

Section 2-1401 of the Illinois Compiled Statutes, (735 ILCS 5/2-1401 (West 2(02)), details the method for vacating or modifying final

judgments more than thirty (30) days after their entry. *Robinson v. Ryan*, 372 Il1.App.3d 167, 172 (1st Dist. 2(07). A section 2-1401 petition may be used to challenge a purportedly defective judgment for legal reasons. *Paul v. Gerald Adelman & Associates, Ltd.*, 223 Il1.2d 85, 94 (2006). "In order to receive relief under section 2-1401, a petition must affirmatively allege specific facts to support each of the following elements: (1) the existence of a meritorious defense or claim; (2) due diligence presenting this defense or claim to the circuit court in the original action; and (3) due diligence in filing the section 2-1401 petition seeking relief." *Robinson*, 372 Il1.App.3d at 173.

1. Meritorious Claim

Turning to the first requirement that petitioner-plaintiff must plead and prove the existence of a meritorious defense, although both parties, in their briefs and at oral arguments, addressed case law about a meritorious defense or claim, all the cases cited by the parties refer to a meritorious defense or claim as it pertained to the underlying cause of action. Subsequent to oral arguments, this Court's research disclosed *Robinson v. Ryan*, 372 Ill.App.3d 167 (l st Dist. 2007), the most recent case addressing this issue from the First District of the Illinois Appellate Court. In *Robinson,* the First District Appellate Court reiterated the rule set forth by the Illinois Supreme Court in *Paul v. Gerald Adelman & Associates, Ltd.*, 223 Ill.2d 85 (2006), explaining how a petitioner establishes a meritorious claim or defense pursuant to section 2-1401. *Robinson* directs that when trial

courts are considering whether a 2-1401 petitioner has a meritorious defense or claim the trial judge should not consider whether the petitioner has a meritorious defense or claim to the underlying case, rather the court considers whether petitioner has a meritorious claim or defense that entitles him to vacate the dismissal order. In *Paul,* the Illinois Supreme Court held, "it was not the trial court's responsibility to determine the merits of the underlying causes of action. The central facts which plaintiff was required to plead and prove in connection with her petitions are not those facts which would establish her entitlement to damages in the underlying actions, but those facts which would establish her entitlement to have the DWP orders vacated." *Paul,* 223 Ill.2d at 107.

In *Robinson*, the issue presented was whether the trial court should have vacated a dismissal with prejudice in a case where, after a settlement was reached and a dismissal entered, it was brought to the trial court's attention in a 2-1401 petition that the defendants' insurer had not given defense counsel the authority to settle the case. In *Robinson*, an affidavit was submitted by the insurance company that no one advised the judge during the settlement conference that the defendant agreed to settle the case. The appellate court in *Robinson* held that the petition and supporting affidavits presented by the defendant, "which outlined the settlement negotiations before the circuit court and set forth facts to show that North American did not grant defense counsel the authority to settle the case by payment of $825,000, also established it's entitlement to relief from the dismissal and

settlement orders." *Robinson*, 372 Ill.App.3d at 176. Here, plaintiff's petition and affidavits present an even more compelling case that plaintiff has shown that he has a meritorious claim to vacate the dismissal order entered on December 1, 2005.

The petition, affidavits, and arguments presented at the hearing before this Court indicate that Derek Thomas, a person adjudicated a mentally disabled by the Probate Division of the Circuit Court of Cook County, did not agree to the settlement ordered by Judge Lopez Cepero on December 1, 2005. Derek Thomas could only agree to the settlement through his guardian. The guardian for Derek Thomas at the time the Court entered the dismissal order on December 1, 2005 was his nineteen-year-old half-brother, Michael Poland, who was not at the hearing on December 1,

2005. There is absolutely no evidence that Sheldon Belofsky consulted with Michael Poland about the settlement. Sheldon Belofsky was not present when the settlement order was entered and. therefore, there is no evidence that Derek Thomas through his attorney or guardian agreed to the settlement. Moreover, although there is no evidence defendant's settlement offer was conveyed to the guardian, even if Michael Poland had agreed to the settlement on behalf of his brother, the Court could not have accepted it because in 2001 Michael Poland was convicted of a felony for stealing from Derek Thomas. As a convicted felon, the Probate Act prohibits Michael Poland from serving as guardian. 755 ILCS 5ill a-5 (West 2007)(formerly 755 ILCS 5IJ 1-3).

If the petition and affidavits detailed in *Robinson* were sufficient to vacate the dismissal with prejudice because counsel for the insurance company did not have the authority to settle the case, then the December 1, 2005 dismissal order must be vacated when the plaintiff has been adjudged mentally disabled, and there is no evidence that he consented to the settlement through either his attorney or guardian. The petition and affidavits submitted by plaintiff, clearly establish plaintiffs meritorious claim to relief from the settlement and dismissal orders of December 1, 2005.

2. Due Diligence in the Underlying Action

The second consideration for relief under section 2- 1 401 is whether the petitioner has acted

with due diligence in presenting his claim to the circuit court in the original action. Here, defendant is correct that generally for relief under section 2-140l a petitioner must show by a preponderance of the evidence that he exercised due diligence in the presentation of the original claim, *Paul*. 223 Il1.2d at 95. However, "[n]o bright-line rule exists for judging whether a petitioner has acted diligently." *Paul*, 223 Ill.2d at 99; *Robinson*, 372 Ill.App.3d at 176, Defendant also is correct that ordinarily a party is responsible for his attorney's negligence in failing to prosecute his case. *Zimmerman v. Village of Skokie*, 174 Ill.App.3d 100l , 1007 (lst Dist 1988). However, courts apply a different analysis in cases involving the interests of a mentally disabled person. *Id*. "An incompetent is a favored person in the eyes of the law and courts have a special duty to protect their rights." *Id*. "An incompetent cannot be

held accountable for any apparent delay, negligence, or *laches* in seeking redress through the courts." Id. The Court may relax the due diligence standard required for relief if the party seeking relief from judgment has demonstrated that a manifest injustice would otherwise result. *Ameritech Publishing of Illinois, Inc. v. Hadyeh*, 362 Ill.App.3d 56,61 (1st Dist. 205). Furthermore, relief under section 2-140 I invokes the equitable powers of the Court and in exercising its equitable powers the Court should not enforce an order if it would be unjust, unfair, or unconscionable even when the due diligence standard is not met. *Smith v. Airoom, Inc.*, 114 Ill.2d 209, 225 (1986).

As previously described, Sheldon Belofsky did little to advance Derek Thomas' case. He regularly missed court appearances, failed to respond to

discovery requests, witnesses were barred, and discovery sanctions imposed against Derek Thomas because of Sheldon Belofsky's lack of diligence, On December 1, 2005, Sheldon Belofsky did not appear and Judge Lopez Cepero entered an order finding the settlement proper and dismissing the ease with prejudice.

In *Brandon v. Debusk*, 85 Ill.App.3d 645 (2d Dist. 1980), the appellate court reversed the trial court's denial of the 2-1401 petition because the attorney did not protect the minor's interest. Similarly, in *Zimmerman v. Village of Skokie*, the court found that where the attorney or guardian "may" not have adequately protected a disabled person's interest, the 2-1401 petition must be granted. *Zimmerman* held "in the context of 2-1401 relief, an adjudicated mentally disabled person

should not be strictly held to the lack of due diligence or negligence of his representatives." *Zimmerman*, 174 Ill.App,3d at 1008.

Derek Thomas' case is much more egregious than the disabled or minor plaintiffs in *Zimmerman* and *Brandon*. Here, it is undisputed that at the time the December 1, 2005 order was entered dismissing with prejudice Derek Thomas' case, the only person present at the hearing was defense counsel, Edward Grasse. Although neither the guardian nor the attorney for the mentally disabled plaintiff was present to protect the interests of Derek Thomas, Edward Grasse did not inform the Court that the mentally disabled plaintiff's half-brother, Michael Poland, had been convicted of felony theft for stealing and cashing Derek Thomas' checks, while acting as his guardian. Edward Grasse also did not

inform the Court on December 1, 2005, when he was seeking to have Judge Lopez Cepero enter a dismissal order, that there was a $272,000,00 Illinois Department of Public Aid lien pending against Derek Thomas that would require the disabled plaintiff to pay the defendant nursing home $97,000.00more than he would receive from the settlement money.

Here, defense counsel's failure to inform the Court of the guardian's actions and of the public aid lien, when defense counsel was the only one at the December I, 2005 hearing with that knowledge, is relevant to this Court's consideration of the 2-1401 petition. Section 2-1401 is based in equity. It is a longstanding maxim that equity will not permit one to rely on his wrongful act, as against those affected by it, to defeat a remedy, which, except for his

misconduct, would not be available. *Mills v. Susanka*, 394 Ill. 439, 450 (1946). Edward Grasse's silence regarding his knowledge of Michael Poland's status as a felon ensured that Michael Poland, as guardian for plaintiff, would have access to Derek Thomas' $175,000.00 in settlement proceeds because mentally disabled parties can only receive settlement funds through their guardian. Defense counsel's failure to inform the Court of the public aid lien ensured that the disabled plaintiff would still owe money after receiving the settlement monies.

Whether equitable or legal principles are applied, trial judges are charged with the responsibility of protecting the best interests of a mentally disabled person and cannot approve a settlement and enter a dismissal order where the

plaintiffs rights were not adequately protected by either his guardian or his attorney. Here, neither Sheldon Belofsky nor Michael Poland protected Derek Thomas' rights, and Edward Grasse withheld information from the Court that clearly would affect whether the Court would approve of the settlement between the parties. Therefore, this Court in the exercise of its equitable powers finds that the lack of due diligence by Derek Thomas' former attorney and convicted felon former guardian will not bar plaintiff from his requested relief under section 2-1401. Derek Thomas, is excused from strict compliance with the section 2-1401 requirement of due diligence in the original action since he is not accountable for the negligence of his representatives. This Court further finds that special protection must be given to Derek Thomas as a mentally disabled person and

enforcement of the December 1, 2005 order would be unjust, unfair, and unconscionable.

3. Due Diligence in Filing the 2-1401 Petition

Lastly, it is petitioner's burden to prove due diligence in filing the section 2-1401 petition by a preponderance of the evidence. To decide if a petitioner diligently filed a 2-1401 petition, the Court must judge the reasonableness of the petitioner's conduct under all of the circumstances. *Paul,* 233 Ill.2d at 99-100; *Robinson*, 372 IILApp.3d at 176. In *Paul*, a case that did not involve a disabled person, the Illinois Supreme Court decided that the petitioner therein met the diligence requirement when she filed her 2-1401 petition six months after she learned her case was dismissed and eighteen months after entry of the dismissal

orders. The Illinois Supreme Court held that the petitioner was entitled to that time to review her case and gather the necessary information to file her petition. *Paul*, 223 Ill.2d at 104. In *Robinson*, which also did not involve a disabled person, the court held that where the defendant petitioned for relief less than two months from when they learned of the entry of judgment defendant had acted in a diligent manner because it took that long for defendant to hire new counsel and file the petition. *Robinson*, 372 Ill.App.3d at 178.

Although not attached to any submission to the Court, defendant concedes in its response to plaintiff's petition that on December 30, 2005, the Guardian ad litem filed a motion to intervene and a motion to vacate the dismissal order of December 1, 2005. On December 30, 2005, Linda Bryceland. the

GAL, filed a motion pursuant to section 2-1301 of the Illinois Code of Civil Procedure, (735 1LCS 5/2-1301 (West 2(02)), for relief from judgment within thirty (30) days. In that motion, the Guardian ad litem raised concerns as to the adequacy of the settlement of the case involving a disabled person. In the motion, the Guardian ad litem informed the Court that all public aid liens must be satisfied before an OBRA (Omnibus Budget Reconciliation Act of 1993) trust can be established. The public aid lien against plaintiff's estate was for $272,000.00, with $209,000 of that amount constituting payments to the defendant, which is the same nursing home where plaintiff now resides. Also, there is no dispute that on June 21, 2006, plaintiffs current counsel, Jeffrey Kroll of the Clifford Law Offices, filed the original petition to vacate Judge Lopez Cepero's order of December I, 2005.

Here, the passage of seven months between the entry of dismissal and filing a petition under section 2- I 401 is reasonably diligent considering the totality of circumstances surrounding the entry of judgment and the conduct of the litigants and their attorneys. In this case, it should he noted that at the time the dismissal order was entered in the Law Division, the GAL Linda Bryceland who had been appointed by Judge Riley of the Probate Division, was investigating the circumstances surrounding Derek Thomas' case. Specifically, Linda Bryceland was investigating the lack of representation given to Derek Thomas by Sheldon Belofsky and the fairness 0 f the settlement offer made to Derek Thomas. Following entry 0 f the dismissal order at a hearing on December I, 2005, at which only Edward Grasse was in attendance,

Edward Grasse tendered to the GAL Linda Bryceland all the orders from the Law Division case. Judge Riley had ordered Sheldon Belofsky to appear before him and tender his file to Linda Bryceland upon threat of a body attachment if he failed to tender the file. However, Sheldon Belofsky did not tender the file. Once Linda Bryceland received the Law Division file, she filed a report with Judge Riley in the Probate Division concerning the dismissal of Derek Thomas' case. On February 10, 2006, Judge Riley ordered Sheldon Belofsky to turn over his file, granted leave for the Guardian ad litem to file a petition to discharge Michael Poland as plenary guardian, and appointed John Carr as temporary guardian. On April 18, 2006, Judge Riley entered an order discharging Sheldon Belofsky as counsel for the estate of Derek Thomas. A little over a week after discharging Sheldon Belofsky as counsel,

Judge Riley granted temporary guardian John Carr's motion for leave to retain Clifford Law Offices as new counsel for Derek Thomas. On June 20,2006, Jeffrey Kroll of the Clifford Law Offices filed an appearance. On June 21,2006, Jeffrey Kroll filed a motion to vacate the December I, 2005 dismissal order pursuant to section 2-1401.

The actions detailed above set out the extraordinary efforts taken by the Guardian ad litem Linda Bryceland, the temporary guardian John Carr, and Jeffrey Kroll of the Clifford Law Offices to ensure the protection of Derek Thomas. Based on their actions, this Court finds that the petitioner has established his due diligence in filing the 2-1401 petition by a preponderance of the evidence.

Based on the foregoing analysis, plaintiff has met his burden by a preponderance of the evidence and convinced this Court that he has met the three requirements for relief under section 2-1401. Plaintiff-petitioner sufficiently has shown that he has a meritorious claim to vacate the dismissal order based on the complete failure of his attorney and court appointed guardian to represent his interest and the lack of any evidence that plaintiff agreed to the settlement. Additionally, the Court's lack of knowledge on December 1, 2005 of the felony conviction of Derek Thomas' guardian as well as the amount of the outstanding public aid lien weighs in favor of vacating the dismissal order in the interest of equity. Plaintiff is excused from strict compliance with the due diligence standard and the negligence of his representatives and their failure to diligently pursue his claim will not be imparted to plaintiff

because he is mentally disabled. Plaintiffs current representatives, Jeffrey Kroll of the Clifford Law Offices, the Guardian ad litem, and current court appointed guardian, have shown due diligence in bringing this petition. Therefore, the dismissal order of December 1, 2005 is vacated pursuant to section 2-1401.

4. Validity of the December 1, 2005 Dismissal Order

Plaintiff also is correct in his assertion that the December 1, 2005 order is unenforceable pursuant to Villalobos v. Cicero School District 99, 362 Ill.App.3d 704, 711 (1st Dist. 2005). The order of December I, 2005 does not comply with Cook County Circuit Court Rules 6.4 and 12.15(c) governing the settlement of disabled persons' personal injury cases in the Law and Probate Divisions.

In order to approve the settlement of a disabled person's personal injury ease in the Law Division, a judge must decide if the proposed settlement agreement is fair and reasonable. In order to allow the judge to approve the proposed settlement agreement, an attorney seeking such approval must file a petition requesting the court to approve the settlement. The Law Division judge must also adjudicate liens, determine attorney fees and expenses, and calculate the net amount distributable to the disabled person. The order approving the settlement must contain language providing that the amount distributable to the disabled person shall only be paid to the representative of the disabled person appointed by the Probate Division and upon presentation of the

order to the Probate Division approving a bond. Ill. R. Cir. Ct. Cook Co., R 6.4(a) and (c) (2007).

Here, no petition was filed with the Court and the December 1, 2005 order dismissing Derek Thomas' case with prejudice did not indicate that Judge Lopez Cepero found the settlement to be fair and reasonable. Moreover, the December 1, 2005 dismissal order did not provide that the settlement monies would only be paid to the representative of the disabled person appointed by the Probate Division, nor did it comply with any of the procedures required by the Cook County Circuit Court Rules.

Additionally, Judge Riley rejected the dismissal order that Judge Lopez Cepero entered without consent from plaintiff, his guardian, or his

attorney, upon its submission to the Probate Division. As noted above, after the Law Division dismisses a case involving a disabled person the case is transferred to the Probate Division to ensure that only the duly appointed guardian, who is required to act in the best interest of the disabled person, will receive the proceeds to manage on behalf of the ward. After an exhaustive investigation and report by Linda Bryceland, the GAL" Judge Riley rejected the proposed settlement of $175,000.00, finding it unconscionable and ensuring that Michael Poland would not have access as his brother's guardian to the $175,000.00 settlement funds.

Under Illinois law, the Court has a duty and broad discretion to protect the interests of wards of the court. *Villalobos*, 362 Ill.App.3d at 711.

"Further, it is the public policy of this state that the rights of minors be guarded carefully. This policy is reflected in the statutory requirement that the court approve or reject any settlement agreement proposed on a minor's behalf In accordance with this provision, Illinois courts have held that neither a next friend nor a court-appointed guardian can approve a settlement of a minor's claim without court approval. Therefore, any settlement of a minors claim is unenforceable unless and until there has been approval by the probate court." Id. at 712 (internal citations omitted). Although the case at bar involves a mentally disabled person and not a minor, the court's holding in Villalobos, applies with equal force. As wards of the court, children and the mentally disabled persons arc the most vulnerable of our society and are entitled to special protection from the Court. Here, Judge Riley of the Probate

Division, following the procedures set forth in the Circuit Court Rules, rejected the proposed settlement approved in the Law Division. Therefore, applying the logic and reasoning in Villalobos, this Court finds the dismissal order of December 1,2005, unenforceable unless and until there has been approval by the Probate Division, and the procedures set forth in the rules of the Circuit Court of Cook County governing settlement of disabled persons' personal injury causes of action have been followed.

CONCLUSION

Therefore, based on the foregoing discussion this Court finds plaintiff has proved that he is entitled to relief, his section 2-1401 petition is granted, and the dismissal order of December 1,

2005 is vacated. All parties shall appear in courtroom 2404 at 9:00 a.m. on July 19, 2007.

ENTERED:

June 27, 2007

/s Deborah Mary Dooling

Deborah Mary Dooling

Circuit Court Judge

Law Division

Exhibit H

No. 07-2122

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

EDUARD ADAM GLAVINSKAS,)
as successor plenary guardian of the Estate)
Appeal from the Circuit Court of
of DEREK J. THOMAS, a disabled person,)
Cook County, Illinois
) Law
Division
Plaintiff - Appellee)
v.) Judge
Deborah Mary Dooling
)
) No. 01 L 04011
)
WILLIAM L. DAWSON NURSING)
CENTER, INC.,)
)
Defendant – Appellant)

BRIEF IN SUPPORT OF
DEFENDANT – APPELLANT,
WILLIAM L. DAWSON NURSING CENTER,
INC.,

C. William Busse, Jr.
Edward K. Grass
BUSSE, BUSSE, & GRASS, P.C.
20 N. Wacker Dr., Suite 1860
Chicago, IL 60606
312/750/1212
312/750-1211 Fax
Atty. No.: 91714

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INTRODUCTION

This matter arises out of an automobile accident in which the disabled plaintiff was a passenger in a car. The settlement was approved and the case was dismissed pursuant to settlement. Thereafter, the plaintiff filed a petition for relief from the December 1, 2005, dismissal order pursuant to Section 2-1401, claiming that the Law Division judge should not have approved the settlement. The trial court granted the plaintiff's petition. No questions of fact are at issue.

ISSUES PRESENTED FOR REVIEW

1. Whether the December 1, 2005, order is final and enforceable.

2. Whether the plaintiff has a meritorious claim for relief from judgment pursuant to Section 2-1401.

3. Whether the plaintiff exercised due diligence in the underlying action.

4. Whether the plaintiff exercised due diligence in filing his Section 2-1401 petition.

STANDARD OF REVIEW

The Illinois Supreme Court recently held that a trial court's disposition of a properly served 2-1401 petition is subject to the statutory rules of civil practice and procedure on appeal. *People v. Vincent*, 871 N.E. 2d 17, 26, 226 Ill.2d 1, 14 (2007). Thus, in cases where no fact or witness credibility issues are in dispute, the proper standard of review is *de novo*. *Id.* at 27. In this case, there are no disputes as to the underlying facts, nor are there any witness credibility issues. Rather, the Court is asked to decide whether the trial Court correctly vacated the December 1, 2005, dismissal order approving

settlement between the parties. This is a question of law under the normal rules of civil practice and procedure. *See First Nat'l Bank of LaGrange v. Lowrey*, 375 Ill.App.3d 181, 203, 872 N.E.2d 447, 469 (1st Dist. 2007) ("[T]he issue of whether the trial court would have approved the settlement is a question of law..."). Therefore, the standard of review is *de novo*, and the appellate court is not required to give deference to the trial court's opinion, dicta or findings.

JURISDICTION

This Court has jurisdiction pursuant to Supreme Court Rule 304(b)(3), which allows for appeal from an order granting relief under section 2-1401 of the Illinois Code of Civil Procedure. 210 Ill 2d R 304(b)(3)

On June 21, 2006, Plaintiff filed a petition pursuant to Section 2-1401 of the Illinois Civil Code seeking relief from the Honorable Judge Lopez-Cepero's December 1, 2005, order approving settlement between the parties and dismissing Plaintiff's case with prejudice. R. C248, C236. On October 31, 2006, Judge Lopez -Cepero found Plaintiff's petition deficient and entered an order dismissing that petition with prejudice. R. C752. On November 29, 2006, the Honorable Judge William Maddux vacated Judge Lopez-Cepero's October 31, 2006, order striking Plaintiff's petition. R. C1078. On June 27, 2007, the Honorable Judge Deborah Mary Dooling granted the plaintiff's petition. R. C1221. On July 27, 2007, defendant timely filed its notice of appeal.

STATUTE INVOLVED

Section 2-1401 of the Illinois Civil Code provides relief from judgments under limited circumstances. The following portions of Section 2-1401 are applicable to the case at bar:

> (a) Relief from final orders and judgments, after 30 days from the entry thereof, may be had upon petition as provided in this Section...
>
> (b) The petition must be filed in the same proceeding in which the order or judgment was entered but is not a

continuation thereof. The petition must be supported by affidavit or other appropriate showing as to matters not of record. All parties to the petition shall be notified as provided by rule.

(c) Except as provided in Section 20b of the Adoption Act and Section 2-32 of the Juvenile Court Act of 1987 or in a petition based upon Section 116-3 of the Code of Criminal Procedure of 1963, the petition must be filed not later than 2 years

after the entry of the order or judgment. Time during which the person seeking relief is under legal disability or duress or the ground for relief is fraudulently concealed shall be excluded in computing the period of 2 years. 735 ILCS 5/2-1401

STATEMENT OF FACTS

I. PRE-SETTLEMENT

This matter arises out of a motor vehicle accident that occurred on October 30, 1999. R. C3. The disabled plaintiff, Derek Thomas, was a passenger in a car owned by the defendant, William L. Dawson Nursing Home (Dawson). R. C3. The car

in use was the President's, Pamela Orr's, company car. R. C173-4. The driver of the vehicle, Robert Martin was Ms. Orr's brother, as well as a maintenance worker at Dawson. R. C173-4. Mr. Martin did not have use of a company car in connection with his employment at Dawson, nor was he using the vehicle for any related business purpose at the time of the accident. R. C173-4. On the date of the accident, Mr. Martin asked Ms. Orr if he could borrow her company car to go to a party, and Ms. Orr gave him permission. R. C173-4. The accident occurred while Mr. Martin was driving home from the party at 6:25 in the morning. R. C3.

The plaintiff's original complaint, filed on April 5, 2001, was filed in two counts: Negligent entrustment and negligence based on *respondeat superior*. R. C3. The plaintiff did not name Mr.

Martin as a defendant. R. C3. Pursuant to the defendant's motion to strike, the court dismissed the negligent entrustment count without prejudice. R. C18, C36. Thereafter, the plaintiff filed an amended complaint[1] in 2002, subsequent to vacating an order that dismissed the case for want of prosecution. R. C79, C82, C90. The plaintiff again filed a two count complaint based on *respondeat superior* and negligent entrustment. R. C90. Again, the negligent entrustment count was dismissed without prejudice. R. C85, C122.

Thereafter, discovery proceeded from January 2003, through November 2003. R. C127. During that time, the only discovery that was completed

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[1] The filed amended complaint cannot be found in the record; however, a copy of the amended complaint exists in the record as an exhibit to one of the defendant's motions.

was written discovery, as well as the depositions of Pamela Orr and the plaintiff's guardian, Michael Poland. R. C133; C172; C392. The plaintiff's attorney sought the deposition of Mario Burke, another passenger in the car, but was unable to locate him. R. C112, C123. The Court ruled that Mr. Thomas, previously adjudicated incompetent, was not required to appear for a deposition and was barred from testifying at trial. R. C156. At the close of discovery, the defendant filed a motion for summary judgment based on the fact that there was no evidence that Robert Martin was acting within the course and scope of his employment with Dawson at the time of the accident. R. C162. The defendant also filed a motion to bar the disclosure of any expert witnesses. R. C191.

While both motions were pending, the parties entered into settlement negotiations. R. C224. On September 22, 2004, the parties met before the Honorable Judge Barbara McDonald for a pre-trial conference. R. C225-6. Present were the plaintiff's attorney, Sheldon Belofsky, the plaintiff's guardian, Michael Poland, and the defendant's attorney, Edward Grassé. R. C489. Judge McDonald reviewed the facts and the pleadings and spoke with all present. R. C489. The court suggested to Mr. Poland that liability against Dawson was non-existent and that the likelihood of an adverse verdict against the plaintiff was high. R. C489-90. Mr. Belofsky then informed the court and defense counsel that $175,000.00 would resolve the case. R. C490. The matter was continued to October 12, 2004; defense counsel merely needed $25,000

additional authority to settle the case. R. C226; C490.

On October 12, 2004, the parties agreed before Judge McDonald to settle the case for $175,000.00. R. C239. It was agreed and understood between the parties that the plaintiff merely needed to decide whether the settlement would be structured or paid in a lump sum. R. C239. The settlement was memorialized in a letter to the plaintiff's counsel on October 14, 2004. R. C239. As stated in the letter, the defendant acknowledged that the plaintiff needed to have the settlement approved in the Law Division and administered in the Probate Division. R. C239.

II. POST-SETTLEMENT

For nearly one year after the settlement, neither the plaintiff nor his attorney took any action

to have the settlement approved. Therefore, the defendant moved to enforce the settlement on September 27, 2004. R. C229. The motion was heard in the Law Division before The Honorable Judge Lopez-Cepero on October 18, 2005, at which time the court ordered the plaintiff to seek approval of the settlement by October 21, 2004, "or this court shall make its own motion to approve the settlement." R. C245. The matter was continued to October 24, 2005. R. C245.

On October 24th, the plaintiff's counsel appeared in the Law Division and advised that he wanted to enter into a structured settlement and that the motion to approve the settlement would be filed shortly thereafter. R. C246. The matter was again continued to November 30, 2005. R. C246. On that date, the plaintiff had still not filed a

motion to approve the settlement, and the matter was continued to the next day. R. C247. On December 1, 2005, the plaintiff's counsel was unable to appear, though the newly appointed guardian *ad litem*, Linda Bryceland[2], was aware of both the date and the location of the hearing. R. C248, C360. At the hearing, defense counsel, Edward Grassé, advised the court as to why the plaintiff's attorney could not be present. R. C1212. Nevertheless, the court, on its own motion, entered an order approving the settlement and dismissing the case with prejudice. R. C248.

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[2] On October 24, 2005, the guardian ad litem (GAL) Linda Bryceland was appointed by Judge Riley in the Probate Division. R. C352; C1062. Procedures in the Probate Division proceeded simultaneously with those in the Law Division. On September 28, 2005, the defendant moved to intervene in the Probate Division in order to enforce the settlement. R. C340.

Nineteen days later, per the order of the Probate Division, Ms. Bryceland filed a motion to intervene in the Law Division case and a motion to vacate the December 1, 2005, order. R. C276, C280. After a lengthy briefing schedule, Ms. Bryceland's motion was denied by Judge Lopez-Cepero on May 4, 2006. R. C301; C318.

Meanwhile, on February 10, 2006, the Probate Division judge, Judge Riley, suspended the powers Michael Poland as guardian and appointed John Carr as temporary guardian. Shortly after, on April 18, 2006, Judge Riley discharged Sheldon Belofsky as the plaintiff's attorney and instructed Mr. Carr to hire Clifford Law Offices as the plaintiff's new counsel. R. C376, C378.

Thereafter, on June 21, 2006, the plaintiff's new attorney filed a Section 2-1401 petition. R.

C326. Defendant's August 7, 2006, response to plaintiff's 2-1401 petition pointed out that Plaintiff's petition was devoid of facts and failed to make a prima facie showing of a meritorious claim. R. C492. Plaintiff then filed an emergency motion to amend his original petition. R. C487, C543. However, plaintiff failed to appear at the emergency motion and Judge Mary Mulhern entered an order striking plaintiff's motion on August 10, 2006. R. C543, C545. On August 23, 2006, Plaintiff filed a second emergency motion to amend his 2-1401 petition *Instanter,* but it was denied. R. C544. On September 6, 2006, plaintiff filed a reply that, except for 17 lines and two exhibits, was identical to the proposed amended petition. R. C553-67. Defendant then filed a motion to strike Plaintiff's reply that was denied on September 13, 2006. R. C748. However,

defendant's motion to strike details page for page that plaintiff's reply is nearly identical to the amended 2-1401 petition proposed in his August 23, 2006 motion. R. C.30. The plaintiff's petition was heard without an affidavit or live testimony, and on October 31, 2006, the court entered an order dismissing the petition with prejudice, based on this deficiency. R. C752; C865. Around the same time, on October 18, 2006, the Probate Division removed Mr. Poland as guardian and wrote in the order that his removal was retroactive to March 1, 2001. R. C858. Finally, on October 26, 2006, Judge Riley drafted an order announcing his rejection of the settlement that Judge Lopez-Cepero had approved almost one-year prior. R. C860-2.

Thereafter, back in the Law Division, the plaintiff presented a motion for reconsideration on

November 27, 2006, at which time Judge Lopez-Cepero entered an order stating that the October 31, 2006, order should have struck the 2-1401 petition rather than dismiss it with prejudice. Judge Lopez Cepero then recused himself from the case and transferred the matter to Judge Maddux for re-assignment. R. C995. On November 29, 2006, the plaintiff again presented a motion before Judge Maddux seeking to vacate the October 31, 2006, order. R. C1078. However, Judge Maddux entered an order vacating Judge Lopez-Cepero's November 27, 2006, order vacating the October 31, 2006, order.

In the interim, counsel for the plaintiff and defendant received a copy of a letter written by Judge Riley, addressed to Judge Maddux, dated November 3, 2006, indicating that Judge Riley did not approve of the settlement and asking Judge

Maddux to "repair the damage" that he felt had occurred in the Law Division. R. C1078-9. Thereafter, defense counsel moved for a substitution of judge. R. C1033. The motion was eventually granted, and the plaintiff's third 2-1401 petition was filed December 20, 2006, and was heard by Judge Deborah Dooling. R. C878, C1037, C1081. Judge Dooling granted the plaintiff's petition on June 27, 2007. R. C1221. It is from this order that the defendant appeals.

ARGUMENT

In moving to vacate the Court's December 1, 2005, order, the plaintiff argued that the order was not a final order, or in the alternative, that the order could be vacated pursuant to section 2-1401 of the Illinois Code of Civil Procedure. The trial court granted the plaintiff's petition on both grounds.

While this Court is not required to give deference to the trial court's opinion on appeal, the defendant will address some of its reasoning throughout its brief.

I. The December 1, 2005, Order Was a Final and Enforceable Order

The plaintiff first argued that the order was not an enforceable or final order, because it did not comply with Circuit Court of Cook County Rule 6.4 or the "Procedures Concerning Settlements of Minors' and Disabled Persons' Personal Injury and Wrongful Death Cases," an unpublished memoranda written and signed by Cook County's Law and Probate Division judges. R. C880. The plaintiff also argued that the order was not enforceable, because the Probate Court did not approve the settlement. R. C880

It is hard to imagine how a dismissal with prejudice would not be considered a final and enforceable order simply because a procedural rule may not have been completely followed. Regardless of this procedural argument, the order is a dismissal of all claims, with prejudice. While it may be argued that Cook County Circuit Court Rule 6.4 was not fully complied with, there is no case law to suggest that this should void the order. In fact, the failure to follow procedural requirements does not render an order void. *In re Estate of Steinfeld*, 158 Ill.2d 1, 16, 630 N.E.2d 801, 808, (1994). Certainly, this holds even greater truth when unpublished memoranda are not followed.

Furthermore, the Law Division has the authority to approve and settle cases pursuant to the Probate Act, Cook County Local Rule 12.15(c),

case law, as well as the unpublished memoranda to which the plaintiff refers. *See First Nat'l Bank of LaGrange v. Lowrey*, 375 Ill.App.3d 181, 872 N.E.2d 447(1st Dist. 2007) (trial court has authority to approve settlement); *See also, Will v. Northwestern Univ.*, 378 Ill.App.3d 280, 293-4, 881 N.E.2d 481, 496-7(1st Dist. 2007). Section 5/19-8 of the Probate Act merely states that settlements must be approved by "the court;" it does not specify that cases must be approved by the Probate Division: "by leave of court without notice or upon such notice as the court directs, a representative may compound or compromise any claim or any interest of the ward or the decedent in any personal estate or exchange any claim or any interest in personal estate for other claims or personal estate upon such terms as the court directs." 755 ILCS 5/19-8.

When read in conjunction with Cook County's local rules, it is clear that other Divisions besides the Probate Division can approve minors' and disabled persons' settlements. Local Rule 12.15(c) reads as follows:

> **(c)** If an action for personal injury to a minor or a disabled person or to a decedent or for wrongful death is pending before another Division, the role of the Probate Division shall be as provided in this subparagraph.
>
> > (i) If the action is for personal injury and is disposed of in another Division by an order entering judgment for the plaintiff or approving a settlement, the guardian of the estate of the ward or the representative of the decedent's estate,

> as the case may be, shall file in the court a petition for authority to receive the proceeds of the action in accordance with the provisions of Rule 6.4 or Rule 6.5, as the case may be.

After settlement of a ward's case pending in another Division, the Probate Division's only role is to distribute the funds of the settlement. Local Rule 12.15(c)(i). In addition, the unpublished Memorandum of Agreement, referred to in Judge Riley's letter to Judge Maddux, expressly states that the judge presiding over a personal injury or wrongful death case has the authority to approve settlements. R. C383; C1037. As such, the order entered by Judge Lopez-Cepero was entirely appropriate and was a final and enforceable order.

II. The Plaintiff Cannot File Successive Petitions to Vacate an Order Pursuant to Section 2-1401 of the Civil Code.

Plaintiff cannot file successive petitions to vacate Judge Lopez Cepero's December 1, 2005, order approving the settlement between the parties. Parties against whom adverse final judgments have been entered may avail themselves of two procedures for vacating those judgments. First, section 2-1203 of the Civil Code provides that within 30 days after the entry of the judgment or order, or within any further time the court may allow within the 30 days or any extensions thereof, parties subject to adverse judgments or orders may file a motion for modification of the judgment or to vacate the judgment. 735 ILCS 5/2-1203. According to the Illinois Supreme Court in *Sears v. Sears*, 85 Ill.2d

253, 259, 422 N.E.2d 610, 611 (1981), once the 30 day period and any extensions of that timeframe has expired, parties subject to adverse judgments are barred from filing successive post-judgment motions.

Second, parties seeking to vacate an adverse judgment after 30 days following such judgment must avail themselves of section 2-1401 that operates as a separate action from the original case and is subject to the ordinary rules of civil practice. *Vincent*, 226 Ill.2d at 7. Though section 2-1401 has its roots in common law equity, "the General Assembly abolished the common law writ system and replaced it with the statutory postjudgment petition" that sets out specific requirements to which petitioners must comply. *Id.* Petitions failing to comply with statutory requirements are subject to

dismissal for want of legal and factual sufficiency. *Id* at 8.

Further, because 2-1401 petitions seek to vacate or modify final judgments after the 30 day period for challenging a judgment by motion has expired, it is well settled that repeated post-judgment motions pursuant to section 2-1401 are prohibited "as they frustrate the policy of bringing finality to court proceedings." *Village of Glenview v. Buschelman*. 296 Ill.App.3d 35, 39, 693 N.E.2d 1242,1245 (1 Dist 1998). Illinois courts recognize only a narrow exception to this rule for cases in which the trial court grants leave to amend a party's 2-1401 petition. *Id.* at 40. This narrow exception only applies to cases in which the amended section 2-1401 petition:

> (1) Be authorized by an order that grants petitioner leave to amend the earlier petition.
>
> (2) Be submitted for the purpose of curing defects in the earlier petition or for alleging grounds that have not and could not have been previously adjudicated and
>
> (3) Be filed within 30 days after the order granting leave to amend.

Id. Significantly, where a party's amended 2-1401 petition does not satisfy these criteria, the trial court lacks proper jurisdiction to hear the amended petition. *Id.*

In this case, Plaintiff failed to file a motion within the thirty day period following the entry of the December 1, 2005 order approving settlement between the parties and dismissing Plaintiff's case with prejudice. R. C248, C236. Having failed to do so, plaintiff was barred from filing any future post-judgment motions pursuant to section 2-1203. *Sears* 85 Ill.2d at 259. Without recourse to section 2-1203, on June 21, 2006, Plaintiff sought to vacate the December 1, 2005, order by filing a petition pursuant to section 2-1401.

Plaintiff's attempt to vacate the December 1, 2005, order pursuant to section 2-1401 was properly denied with prejudice for failing to satisfy that section's specific evidentiary and procedural requirements . *See Vincent,* 226 Ill.2d at 7. According to Judge Lopez Cepero's October 31, 2006

order dismissing Plaintiff's petition with prejudice, plaintiff was instructed that the petition lacked evidence upon which the court could base an opinion as to the diligence of Plaintiff's initial counsel, Sheldon Belofsky. R. C864. Though he was granted 30 days to produce Mr. Belofsky or an affidavit, plaintiff failed to produce evidence necessary to the court's its inquiry into the sufficiency of Plaintiff's 2-1401 petition. R.C864.. Judge Lopez-Cepero correctly states in the October 31, 2006 order that a 2-1401 petition "'**must** be supported by affidavit or other appropriate showing as to matters not of record' ... The language of the statute is clear thereby eliminating the exercise of any discretion by this court." R. C752 *quoting* 735 ILCS 5/2-1401(b), *emphasis added in court order.* Significantly, Plaintiff's 2-1401 petition failed despite his attempts to amend the petition.

Since it is well settled that repeated post-judgment motions pursuant to section 2-1401 are prohibited, plaintiff's successive motions to amend his June 21, 2006 petition were properly denied since they did not satisfy the narrow requirements for amending such a petition. *See Buschelman*. 296 Ill.App.3d at 39-40. After filing his original 2-1401 petition on June 21, 2006, Plaintiff filed an emergency motion to amend his petition that was denied on August 10, 2006 "as no representative appeared for plaintiff..." R. C543. On August 23, 2006, Plaintiff filed a second emergency motion to amend his original 2-1401 petition *instanter*, but it too was denied. R. C544. Significantly, neither of Plaintiff's motions offered additional grounds that could not have been previously adjudicated. Rather the motions were identical and based only on a vague intent to clarify the record and prevent undo

injustice. R. C547, *See Buschelman.* 296 Ill.App.3d at 39-40. Undeterred by the court's orders denying his successive motions to amend his section 2-1401 petition, on September 6, 2006, Plaintiff filed a reply brief that was nearly identical to his previous motion to amend. R. C553. This reply contained only 17 lines that were different than the proposed amended petition and presented no evidence curing defects in Plaintiff's petition, or alleging grounds that could not have been previously adjudicated. SR.1 C30

Following Judge Lopez-Cepero's October 31, 2006, order, Plaintiff filed a Motion to Reconsider the that order but lacked any basis under either sections 2-1203, or 2-1401 to do so. R. C753.

Even if Plaintiff's motion were construed as an attempt to amend his 2-1401 petition, his

attempt is fatally flawed since it does not cure defects in the earlier petition or allege grounds that have not and could not have been previously adjudicated. *Buschelman*. 296 Ill.App.3d at 39-40. Plaintiff first based his motion on his claim that lack of due diligence on the part of Mr. Belofsky was not dispositive on the question of whether the settlement order should be vacated. R. C753. Though this legal argument may be an appropriate basis for an appeal, it neither cures defects in Plaintiff's original petition, nor alleges any grounds that could not have been previously raised. Plaintiff's second basis for his motion is his contention that the law requires that the probate court approve settlements in cases involving wards. R. C754. Plaintiff cannot argue that this claim does anything to correct his original petition, since it was made in paragraph 15 of his original petition: "a

settlement of a ward's claim is unenforceable unless and until there has been approval by the Probate Court." R. C331. Rather than correct his petition, plaintiff attempts to relitigate an issue that was already disposed of by the court's October, 31 order. *See Davis v. Chicago Transit Authority*, 82 Ill.App.3d 987,989, 403 N.E.2d 615, 616-617 (1980) (petition brought under section 2-1401 cannot be used to relitigate question previously ruled upon).

Finally plaintiff's motion states that "events have transpired since the filing of the 2-1401 petition which call into question the validity of the alleged settlement in this case." R. C755. First among these events was the removal of Michael Poland as Guardian of Derek Thomas. R. C755. However, while this event took place after the filing of Plaintiff's 2-1401 petition, Plaintiff presents no

evidence in his motion as to how this fact cures the defects in his original petition or why he could not have previously adjudicated this issue. Plaintiff has more than demonstrated his familiarity with emergency motions and could have placed Mr. Poland's removal as Guardian of Derek Thomas before the court with such a motion. More importantly, evidence regarding Michael Poland's performance as Guardian of Derek Thomas was already before the court. Plaintiff's original petition cites to a December 15, 2005, report prepared by Guardian Ad Litem Linda Bryceland in which she makes clear her feelings that Mr. Poland failed to satisfy his obligations as guardian. R. C354-358. Referring to Ms. Bryceland's December 15, 2005, report, plaintiff's original 2-1401 petition argues that Mr. Poland's felony conviction disqualified him as Derek Thomas' guardian, and the failure to

disclose his convictions constituted a fraud on the court. R. C334-335, R. C366-370. Significantly, according to Judge Deborah Mary Dooling's June 27, 2007, order granting Plaintiff's 2-1401 petition, the same evidence of Mr. Poland's conviction was the basis for his removal as Guardian. R. C1224. Thus the order removing Mr. Poland as Guardian put nothing new before the court, since the evidence that was the basis of the Probate Court's order was already included in Plaintiff's original 2-1401 petition.

Second, Plaintiff 's allegation that the probate Court's October 26, 2006, rejection of the settlement agreement is grounds for vacating the December 1, 2005 settlement order suffers from the same flaw. Paragraph 5 or plaintiff's original 1401 petition states, "the purported settlement is inadequate to

meet the needs of the Ward and appears low in light of the injuries sustained by the Ward." R. C327, *emphasis in original.* Plaintiff cites Linda Bryceland reports in support of his contention, each of which discusses in detail her feelings that the settlement was inadequate. R. C357, R. C369-370. Additionally, plaintiff's original petition includes Linda Bryceland's Motion to Reconsider or in the Alternative, for Relief Pursuant to Section 2-1301, that was denied along with her motion to intervene on May 4, 2006. R. C318, R. C459-469. Ms. Bryceland's motion includes extensive factual and legal basis in support of her contention that the settlement was inadequate. C.463-468. Again, plaintiff presents no additional evidence that was before the Probate Court that could not have been considered in connection with his original 2-1401 petition. Though the Probate Court came to a

different conclusion about the propriety of the settlement agreement, plaintiff's attempt to amend his 2-1401 petition does not cure the defects in his original petition or offer evidence that not previously adjudicated.

Thus plaintiff's motion failed to allege any grounds that have not or could not have been previously adjudicated or that corrected his original 2-1401 petition. Rather it presents legal arguments that would be more appropriate for an appeal, and alleges facts already adjudicated in prior proceedings. Since Plaintiff's motion does not satisfy the criteria necessary for amending a 2-1401 petition, the trial court lacked proper jurisdiction to hear Plaintiff's successive 2-1401 petitions and Judge Lopez-Cepero's November 27, 2006, order modified his October 31, 2006, order and all

subsequent trial court dispositions in this matter are void. R. C752, *Buschelman*. 296 Ill.App.3d at 40.

Additionally, it is critical to note that Judge Lopez-Cepero's October 31, 2006, order dismissing the plaintiff's 2-1401 petition with prejudice remains undisturbed. On October 31, 2006, Judge Lopez-Cepero entered an order denying the plaintiff's motion to vacate pursuant to section 2-1401 with prejudice. R. C992. On November 27, 2006, he modified the October 31st order to change the words "dismissed with prejudice" to "plaintiff's motion being stricken." R. C995. On November 29, 2006, Judge William Maddux vacated Judge Lopez-Cepero's November 27 order in its entirety. Paragraph one of Judge Maddux's November 29, 2006 order reads: "The order of Judge Lopez-Cepero

striking the plaintiff's 2-1401 petition of October 31, 2006 is **vacated**." R. C997, *emphasis added.* Consequently, Judge Lopez-Cepero's October 31, 2006, order dismissing plaintiff's petition with prejudice disposed of plaintiff's petition, and Judge Deborah Mary Dooling lacked any jurisdiction to hear this matter or to grant plaintiff's 2-1401 petition in her June 27, 2007, order. R. C1221.

III. The Plaintiff Does Not Have a Meritorious Claim to Relief from Judgment

In determining whether the plaintiff's 2-1401 petition should be granted, the court is to consider three factors: (1) whether the plaintiff has a meritorious claim for relief from judgment; (2) whether the petitioner acted with due-diligence in the underlying case; and (3) whether due-diligence

was performed in filing the 2-1401 petition. *Paul v. Adelman &Assoc., Ltd.*, 223 Ill.2d at 94.

The first factor to be addressed is whether the plaintiff has a meritorious claim to relief from judgment. *Id.* The plaintiff does not have a meritorious claim to relief from judgment, because the settlement was valid and binding, the orders of Judge McDonald and Judge Lopez-Cepero must be given deference and these orders cannot be un-done by the Probate Court.

A. The Settlement Was Valid and Binding

In his prior briefs, the plaintiff did not cite to any controlling authority as to why the settlement entered into by the parties, with the assistance of a sitting judge, was invalid. On two separate occasions, the parties appeared before Judge

McDonald. R. C226, SR. C5-6. Present for those hearings were the plaintiff's attorney, Sheldon Belofsky, the guardian, Michael Poland and defense counsel, Edward Grasse. R. C489. The parties met and discussed the facts with the court, including the pros and cons of settlement, the pleadings, the injuries to the ward, and all other issues typically addressed at a pre-trial conference.R.489-90. After several hours of discussion, the parties agreed to settle the case against this defendant for $175,000. R. C239. Thereafter, the settlement was approved in writing by Judge Lopez-Cepero. R. C248.

A settlement is valid and binding where the parties knowingly and voluntarily accept the settlement. *Kalman v. Bertacchi*, 57 Ill.App.3d 542, 548, 373 N.E.2d 550, 555 (1st Dist. 1978). The plaintiff cannot argue that there was not a

settlement reached between the parties: the plaintiff implicitly admitted that there was a settlement in his prior briefs. R. C879. That the parties knowingly and voluntarily accepted the settlement cannot be contested. The fact that the Probate Court and the plaintiff's new attorneys do not like the settlement does not invalidate the settlement. The settlement was knowingly and voluntarily entered into before a judge during a pre-trial conference and, later, explicitly approved by another Law Division judge. R. C248. This approval must be given deference by the reviewing court. *See Will*, 378 Ill.App.3d at 293-4. Furthermore, settlements entered into during a pre-trial conference also receive deference as to their validity. *See e.g., Perez v. Espinoza*, 137 Ill.App.3d 762, 765, 484 N.E.2d 1232, 1235 (1st Dist. 1985).

In its opinion granting the plaintiff's 2-1401 petition, the Court reasoned that "Derek Thomas did not agree to the settlement ordered by Judge Lopez-Cepero on December 1, 2005," because his guardian at the time, Michael Poland, was a convicted felon. The court's reasoning is flawed for two reasons: First, the settlement was not entered into on December 1, 2005; it was entered into on October 12, 2004. R. C239. Judge Lopez-Cepero did not "order" the settlement. The settlement was reached and agreed to by the parties over one year prior. R. C239. The December 1, 2005, order merely memorialized the court's approval of the settlement and dismissed the case with prejudice. R. C248.

Second, the court misconstrued the application of the Probate Act's statutory requirements for guardians and their applicability

to the case at hand. The court reasoned that convicted felons may not serve as guardians, and, therefore, that Michael Poland's agreement to settle this case was invalid. R. C1226. The court's reasoning is a *non sequitur*, as the court did not explain how or why the statute renders the October 2004, settlement void *ab initio*. Notably missing from the trial court's opinion is the fact that Mr. Poland was not a convicted felon at the time he was appointed guardian. C453. The plaintiff has not argued that Michael Poland was a convicted felon at the time of his appointment, only that he was subsequently convicted of a felony.

The initial order[3] appointing Mr. Poland guardian vested him with authority to settle the

[3] This order is not a part of the record in the Law Division case, however, based on Judge Riley's October 26, 2006, one may

case in October 2004. *In re K.C.*, 323 Ill.App.3d 839, 849, 753 N.E.2d 314, 321(1st Dist. 2001) ("A plenary guardian...is vested upon appointment with the entirety of the authority provided under Section 11a-17."). Mr. Poland was not divested of his authority until 2006, two years after the parties reached a settlement agreement and at least five years after he was appointed guardian. R. C239; C858. Therefore, at the time of settlement, Mr. Poland was empowered to enter into such a settlement, and the settlement must be presumed valid and enforceable.

Despite the validity of the order and the settlement, the Probate Court then decided to retroactively divest Mr. Poland of his guardianship.

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surmise that the original order was entered in or before 2001. R. C858.

The Probate Court did not cite to any rule of law that would allow for the retroactive removal of a guardian, and nothing has been cited by the plaintiff or the Law Division court, which would give any validity to such an order. In fact, allowing the retroactive removal of a guardian could create a myriad of complicated procedural and legal problems. In this case, it creates a constitutional issue as to the defendant's vested right in enforcing a valid settlement agreement.

The court may not retroactively divest Mr. Poland of his authority to settle the case on behalf of Mr. Thomas for at least two reasons: (1) because the initial order appointing Mr. Poland guardian was not suddenly voided by his 2001 felony conviction; and (2) because the retroactive application of the Probate Court's October 18, 2006, order may not

impair the defendant's vested rights in the parties' settlement agreement which was approved by the Law Division. *Weisberg v. Royal Ins. Co. of Am.*, 124 Ill.App.3d 864, 870, 464 N.E.2d 1170, 1174 (1st Dist. 1984).

To illustrate the first point: Even if Mr. Poland had been a convicted felon at the time he was appointed guardian, his authority would not have been void *ab initio*. In *In re Estate of Steinfeld*, 158 Ill.2d 1, 630 N.E.2d 801 (1994), the court was asked to decide whether an order appointing guardianship was void *ab initio*. Noting that the procedural requirements for appointing the ward's guardian were not followed, the court nevertheless ruled that the court's error did not void the guardianship appointment. *See id.* at 16. Orders are only void where the court lacks jurisdiction to

enter the order in the first place. *See id.* at 12. The *Steinfeld* court ruled that the statutory requirements outlined by the Probate Act are merely procedural in nature, not jurisdictional. *See id.* at 16. Therefore, as long as the Probate Court has jurisdiction to appoint the guardian in question, the order of appointment is valid and enforceable. *Id.* ("...despite the court's failure to follow various procedures, the guardianship order was a valid order.").

In this case, the Probate Court not only had jurisdictional authority to appoint Mr. Poland as guardian, but procedurally the court did not err in appointing Mr. Poland as guardian, because he was not a convicted felon at the time of his appointment. C453. Therefore, the order appointing Mr. Poland guardian was not void *ab initio*. The Probate Court

did not remove Mr. Poland as guardian until October 18, 2006. R. C858. Mr. Poland was vested with authority to settle on behalf of Mr. Thomas at the time of the settlement in 2004. *See In re K.C.*, 323 Ill.App.3d at 849.

B. The Law Division's Approval of the Settlement Must Be Given Deference

The fact that the Probate Division judge did not approve of the settlement *post facto* is immaterial. The fact that the guardian *ad litem* did not approve of the settlement is also insignificant. *See e.g., Will*, 378 Ill.App.3d at 293-4. The fact that the Law Division court approved the settlement is enough to uphold the December 1, 2005, order. *See e.g. Lowrey*, 375 Ill.App.3d at 200 - 201; *Will*, 378 Ill.App.3d at 293-4.

The plaintiff argued that the Law Division would not have approved the settlement if it had seen the guardian *ad litem*'s report, and because it did not know that Michael Poland was a convicted felon and that there was a Public Aid Lien. R. C880. This contention, however, is purely speculative. A guardian *ad litem*'s recommendations are not binding on the court's ability to approve settlements. *See Will*, 378 Ill.App.3d at 293-4. Furthermore, even if this Court finds that Mr. Poland lacked the authority to settle the case on behalf of Mr. Thomas, this does not affect the trial court's ability to approve the settlement. The court has the obligation to protect the ward's best interests. *See Will*, 378 Ill.App.3d at 293-4. Therefore, even where a plenary guardian and/or a guardian *ad litem* does not accept or approve a settlement agreement, the court may – in fact, often

must – act on its own authority to approve a settlement on behalf of the ward. *See id.* Regardless of whether Mr. Poland was convicted of a felony, the court's own judgment can stand in the place of the guardian's judgment and approve or disapprove settlements on behalf of the ward:

> '[T]he... court has a duty to prevent the rejection of settlement offers which in the [ward's] best interests should be accepted' ... [T]he court's authority to perform its duty in this regard extends only to those cases where the evidence demonstrates that compromise is in the best interest of the [ward]....

> Ultimately, '[w]hen the court has made such an examination and has determined that settlement, rather than the uncertainties of trial, is in the best interest of the minor, and when that determination is supported by the record, it will be affirmed. (citations omitted).*Id.*

In this case, Judge McDonald and Judge Lopez-Cepero reviewed the facts and pleadings of the case. R. C226; C248. The court was aware that a motion for summary judgment and a motion to bar were pending at the time the case was settled; the plaintiff was barred from testifying; and the only

count on file against the defendant was a negligence count based on *respondeat superior*: R. C90; C122. In short, the court was fully aware that, given the facts and procedural posturing of the case, liability against the defendant was slim to none. As stated, the court's December 1, 2005, order speaks for itself: The settlement was explicitly approved by the trial court, which had full knowledge of the procedural posturing of the case, as well as the strengths and weaknesses of both sides. That determination should be given deference. *See Will v.* 378 Ill.App.3d at 293-4.

C. The Probate Division Had No Authority to Reject the Settlement and Attempt to Re-Open The Litigation

After the settlement was approved and the case dismissed, Judge Riley entered a number of orders in an effort to thwart the Law Division's

authority: directing the guardian *ad litem*, Linda Bryceland, to vacate the December 1, 2005, order; retroactively removing Michael Poland as the guardian; and rejecting the settlement. R. C858; C860-2. The Probate Division had no authority to enter any of the above orders.

Once a final order has been entered, the court has no jurisdiction to re-open litigation *suasponte* more than 30 days after judgment has been entered. *See Welch v. Ro-Mark, Inc.*,79 Ill.App.3d 652, 656-7, 398 N.E.2d 901, 904 (1st Dist. 1979). Cook County Local Rule 12.15(c) governs the role of the Probate Court when a settlement has been approved by another division. That rule states:

> **(c)** If an action for personal injury to a minor or a disabled person or to a decedent or for wrongful death is pending before another

Division, the role of the Probate Division shall be as provided in this subparagraph.

> (i) If the action is for personal injury and is disposed of in another Division by an order entering judgment for the plaintiff or approving a settlement, the guardian of the estate of the ward or the representative of the decedent's estate, as the case may be, shall file in the court a petition for authority to receive the proceeds of the action in accordance with the provisions of Rule 6.4 or Rule 6.5, as the case may be.

Accordingly, the Probate Court's only role, by law, was to control the distribution of proceeds. The invalid and inappropriate attempts by the Probate

Court to vacate a valid settlement, simply because it did not like the outcome, should not be sanctioned by this court or any other court.

Furthermore, the Probate order rejecting the settlement was entered October 26, 2006. R. C860. Just as this order could not vacate the December 1, 2005, order, the order could have no legal effect upon the previously approved settlement and dismissal order, because the case was dismissed. As the Probate Court had no jurisdiction over the settlement in the dismissed Law Division suit, the October 26, 2006, order is void and can have no legal effect. *See e.g., Steinfeld*, 158 Ill.2d at 12.

Similarly, while the Probate Court retained jurisdiction over the guardian and the distribution of the settlement funds, the court had no authority to retroactively remove the guardian in an effort to

void the settlement agreement. The retroactive application of laws, which impairs contracts, is unconstitutional. *Weisberg*, 124 Ill.App.3d at 870 ("rights under a contract become 'vested,' for purposes of the retroactive application of a statute, when the contract is entered into..."). The defendant had a vested right to the settlement agreement entered into on October 12, 2004, pending court approval. *See id.* The terms of the agreement were implicitly approved by Judge Barbara McDonald at the time of the pre-trial conference in September 2004, and explicitly approved by Judge Lopez-Cepero on December 1, 2005, when he entered an order approving the settlement. R. C225-6; C248.

The court's December 1, 2005, order speaks for itself. The fact that procedural rules were not followed by the court on December 1, 2005, does not

invalidate the order. R. C867, C1197. Judge Lopez-Cepero had jurisdictional authority to approve the settlement agreement, which could not be "un-done" by the Probate Court, neither by retroactively removing Mr. Poland as the guardian, nor by rejecting the settlement after a final judgment had been entered. *See Lowrey*, 375 Ill.App.3d at 204 ("The trial court has the authority to approve [a ward's] settlement when the evidence shows that the compromise is in the best interests of the [ward.]"). *See also* Cook County Local Rule 12.15(c).

Therefore, as the parties entered into a valid and binding settlement agreement that was properly approved by the court, the plaintiff lacks a meritorious claim for relief from judgment. The plaintiff's 2-1401 petition should be denied on this basis alone.

IV. The Plaintiff Did Not Exercise Due Diligence In the Underlying Action

The second factor in determining whether the plaintiff's 2-1401 petition should have been granted is whether the plaintiff exercised due diligence in the underlying claim. *Paul,* 223 Ill.2d at 94. That the plaintiff failed to exercise due diligence in the underlying case is supported by the record and the court's finding. R. C1227.

As argued by the defendant at the trial level, it is the plaintiff's burden to prove that, at the time of the entry of the order, he failed to raise or discover the asserted grounds for a claim for relief through no fault or neglect of his own. *See Gayton v. Levi*, 146 Ill.App.3d 142, 148, 496 N.E.2d 1045, 1049 (1st Dist. 1986). This, the plaintiff cannot do, as the grounds for relief asserted – namely, Michael

Poland's conviction and the Public Aid Lien – were known to the plaintiff at the time of the court's approval of settlement and the entry of the dismissal order. Though the plaintiff had a new attorney and a new guardian at the time his 2-1401 petition was finally heard, this does not change the due diligence requirement in the underlying suit.

This case was pending from April 5, 2001, to December 1, 2005. R.C3; C248. During that time, the only discovery pursued and completed by the plaintiff was answers to written discovery and the deposition of Pamela Orr.C172; C649. At no time did the plaintiff's attorney request any additional discovery from any person at Dawson. The only discovery that the plaintiff sought to take was the deposition of Mario Burke, a passenger in the car. R. C113. Additionally, throughout discovery, the

plaintiff's counsel also failed to appear at case management conferences. R. C125. On July 2, 2003, a final discovery schedule and a trial date of February 4, 2004, were set. R. C127. Plaintiff's counsel never sought an extension of time for any of the discovery closure dates. The July 2, 2003, order also included a time for the plaintiff to disclose experts and to produce those experts for depositions. R. C127. No experts were ever disclosed and no additional discovery was taken.

In addition, plaintiff's counsel was ordered to produce the plaintiff, Mr. Thomas on several occasions. R. C59; C127. As the plaintiff's deposition never proceeded, a motion to compel was brought by the defendant. R. C142. On November 10, 2003, that motion was heard and an order was entered barring the plaintiff from testifying at trial.

R. C156. The plaintiff's attorney did not appear for this motion hearing and had *not* filed any objection. C.156. Subsequently, the case rose above the Black Line and the plaintiff's counsel chose to enter into settlement negotiations. R. C223-4.

It is obvious that the plaintiff's current counsel and the Probate Division do not approve of the result or the actions of the plaintiff's prior counsel; however, this does not obviate the requirement in a section 2-1401 petition to show due diligence in the underlying action. An attorney's negligence cannot re-open litigation every time a plaintiff is unhappy with the result. The purpose behind this rule seems fairly clear: At some point, "litigation, even when it involves a plaintiff who is a member of a favored class, must end at some point."

Cload v. West, 328 Ill.App.3d 946, 954, 767 N.E.2d 486, 493 (2nd Dist. 2002). As *Cload* further stated:

> A disabled person or minor, like anyone else, may lose a suit. If we were to accept plaintiff's policy argument [that the ward must be allowed to open a new suit] such plaintiffs, merely by virtue of their status, would be free to relitigate causes of action....*Id.*

The plaintiff argued in his original 2-1401 petition that the ward should not be held responsible for the actions of his guardian and attorney; yet, as *Cload* so aptly stated: at some

point, all litigation must come to an end. The plaintiff's injury occurred in 1999, almost 10 years ago. This case was filed over seven years ago and settled over four years ago. The proper remedy for the plaintiff – if he believes he requires one – is a legal malpractice suit against his former attorney.

That due diligence was not performed by the plaintiff in the underling suit was the one defense argument with which the trial court agreed in its opinion: "Sheldon Belofsky did little to advance Derek Thomas' case. He regularly missed court appearance, failed to respond to discovery requests, witnesses were barred, and discovery sanctions imposed against Derek Thomas because of Sheldon Belofsky's lack of diligence." R. C1227. Nevertheless, the trial court reasoned: "Derek Thomas is excused from strict compliance with the

section 2-1401 requirement of due diligence in the original action because he is not accountable for the negligence of his representatives." R. C1228.

The equity afforded the plaintiff by the court in excusing him from strict compliance with section 2-1401, however, was imbalanced and based on reasoning that failed to weigh the interests of both parties and improperly accused defense counsel of wrongdoing: namely, of not informing the Law Division of the plenary guardian's felony conviction and the Public Aid lien. R. C1127. The defendant, however, did not have an obligation to disclose either of these facts; that responsibility lies with the plaintiff. The defendant was not "benefiting from a wrongdoing" by having the case dismissed. The court approved the settlement and dismissed the case *suasponte*, as the court had previously stated it

would, if the plaintiff failed to move on his own. R. C245. It is not the fault of the defendant that his guardian and representative both failed to appear on December 1, 2005, to advise the Court of these matters.

More importantly, there is no reason to suggest that these facts would have dissuaded the court from continuing to approve of the settlement. As previously discussed, the settlement was valid, regardless of Mr. Poland's status. Furthermore, the guardian *ad litem* had already negotiated the Public Aid lien to one-third of the settlement agreement – a fact notably missing from the trial court's opinion. R. 49. Mr. Poland's felony conviction and the negotiated Public Aid lien do not change the procedural posture of the case, nor the potential liability of the defendant: they do not change the

fact that the plaintiff sought to recover sums from an entity whose only link to the plaintiff was created when its President gave her brother permission to use her company car for a non-business related purpose. R. C173-4. This is the only fact that the plaintiff would have been able to prove at trial and is, without question, not enough to prove liability against the defendant based on *respondent superior*.

In reaching a decision based on equitable principles, the court must weigh the interests of both parties. *See e.g. Genesco, Inc., v. 33 N. LaSalle Partners, L.P.*, 2008 WL 2228852 (1st Dist. 2008) at *8 (equitable principles require "balancing of equities"); *See also, Flisk v. Central Area Park Dist.*, 203 Ill.App.3d 253, 560 N.E.2d 1160 (1st Dist. 1990) (equities between parties must be weighed). The

trial court did not adequately or properly balance the equitable interests of both parties in reaching its conclusion that the plaintiff was excused from strict compliance with the due diligence requirement of Section 2-1401. Instead, the court only considered the interests of the plaintiff, relying solely on the principle that he is a favored person in the eyes of the law. The court failed to consider the defendant's interest in ending the litigation; failed to acknowledge that that the plaintiff has an additional recourse of action through a legal malpractice suit (although it ostensibly found Mr. Belofsky negligent in the underlying action by its order); and improperly burdened defense counsel with the impossible (and unethical) representation of both parties.

In fact, in balancing the above-noted factors, equity favors both the plaintiff and the defendant by upholding the settlement, because (1) the plaintiff did not practice due diligence in the underlying action as required for relief from judgment under Section 2-1401; (2) the plaintiff may be able to recover additional money for his injuries in a legal malpractice suit, pursuant to the trial court's finding that Sheldon Belofsky was negligent; (3) defense counsel is not benefiting from any such wrongdoing, as improperly suggested by the Court; (4) the settlement affords the plaintiff some relief from a defendant against whom he would surely not recover at trial; and (5) all litigation must, at some point, come to end.

V. Due-Diligence Was Not Performed in Filing the Section 2-1401 Petition

Finally, the plaintiff must also prove that due-diligence was exercised in filing the 2-1401 petition. *Paul,* 223 Ill.2d at 94. This, also, the plaintiff patently failed to do.

The dismissal order was entered on December 1, 2005. R.C248. The plaintiff's original petition was not filed until June 21, 2006, over six months after the dismissal order was entered. R. C326. In addition, this first petition was inadequate, as it failed to address the plaintiff's due diligence in the underlying action. R. C236. The second petition was also inadequate, as the plaintiff failed to support the due diligence requirement, either by affidavit or by testimony. R. C753. The plaintiff's third version of the petition was not filed until December 20, 2006, more than one year after the dismissal order of December 1, 2005, was entered. R. C879.

Furthermore, as stated in the defendant's response, "[t]he plaintiff, by his own admission, took absolutely no action during the six months between the entry of the dismissal order and the filing of his initial petition in June." SR. C24. Mr. Carr was appointed guardian by the Probate Court in replacement of Mr. Poland on February 10, 2006, and was present for many hearings in the six months following the entry of dismissal order. R. C849; SR. C24. Mr. Carr even discussed the need for a 2-1401 petition with defense counsel. SR. C24. The guardian *ad litem* attempted to intervene and vacate the dismissal order within 30 days of the entry of the dismissal, but lacked standing to do so. R. C256; C276; C318. Clearly, both the guardian *ad litem* and Mr. Carr were aware of the perceived need to vacate the dismissal order in some fashion.

Still, the first (and facially invalid) 2-1401 petition was not filed until June 21, 2006. C326.

In *Juszyk v. Flores*, 334 Ill.App.3d 122,128, 777 N.E.2d, 454, 459 (1st. Dist. 2002), the court found that a two and a half month delay was inexcusable, particularly where counsel had appeared in court before filing the 2-1401 petition and had failed to raise the meritorious claim for relief during that time. Similarly, Mr. Carr was present at hearings subsequent to the dismissal order being entered and failed to advise the court as to reasons the December 1, 2005, order should not have been entered. SR. C52.

In *Flisk v. Central Area Park Dist.*, 203 Ill.App.3d 253, 560 N.E.2d 1160 (1st Dist. 1990), the court denied a 2-1401 petition, because of the petitioner's patent negligence in the underlying suit

and inexcusable delays in filing the petition. A lengthy quote from the *Flisk* opinion is worth repeating, given the similarities in procedural histories that *Flisk* and this case share:

> The equities in no way support [the petitioners'] position ...in all fairness to [the respondent], we cannot condone (1) the failure of [petitioners] to exercise due diligence in defending against the underlying action; (2) neglecting to seek relief from the default judgment within 30 days of its entry, although their

attorney had the opportunity to do so; (3) a similar lack of diligence in their filing for section 2-1401 relief; (4) their dismal display of negligence in permitting their first 2-1401 petition to be dismissed for want of prosecution; and (5) their inexcusably taking almost six and one-half months...to file a second 2-1401 petition....To grant relief to parties who so blithely pyramid their negligence presents but a

clinical case of an abuse of discretion. *Id.* at 258.

But for the fact that the petitioners in *Flisk* were the defendants, *Flisk* could be almost reciting the procedural history of this case, which had not two, but *three* 2-1401 petitions filed before successfully filing a legally adequate petition. Like *Flisk*, the plaintiff could have sought to vacate the December 1, 2005, order within 30 days, but did not; the plaintiff could have filed its first petition before six months, but did not; the plaintiff could have filed a procedurally accurate brief the first two times, but did not. The plaintiff took over one year to file the first legally adequate 2-1401 petition – almost twice the amount of time that passed in *Flisk*. The procedural history of this case presents a "pyramid

of negligence" on the part of the plaintiff, which the equities cannot favor.

While neither of the above-cited cases dealt with a disabled plaintiff, the plaintiff's failure to timely file his 2-1401 petition should not be excused for the same reasons previously discussed in considering the lack of diligence in the underlying case. Therefore, neither law nor equity should excuse the plaintiff's lack of due diligence in filing its petition for relief from judgment.

CONCLUSION

In reviewing the facts and law *de novo*, the Appellate Court should find that the trial court erred in granting the plaintiff's 2-1401 petition. The Court's December 1, 2005, order is valid and enforceable; the plaintiff did not satisfy the narrow

requirements for amending a 2-1401 petition; the plaintiff does not have a meritorious claim to relief from judgment, because the settlement was valid and properly approved by the Law Division; the plaintiff's attorney failed to act with due diligence in the underlying case, from which the plaintiff is not excused; and, lastly, the plaintiff's 2-1401 petition was not filed with due diligence.

Wherefore, the defendant, William L. Dawson Nursing Center, by and through its attorneys, respectfully requests this court to reverse and remand the trial court's June 27, 2007 order, with special instructions for the trial court to enter an order approving the settlement as in the best interests of the plaintiff and which conforms to the procedures outlines in the Circuit Court of Cook

County Local Rule 6.4, and whatever other relief this court deems appropriate.

Respectfully submitted by:

/s C. William Busse, Jr.

C. William Busse, Jr., an attorney for the defendant-appellant, William L. Dawson Nursing Center, Inc.
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Attorney No.: 91714

Exhibit I

State of Illinois
Circuit Court of Cook County
Probate Division

James G. Riley
Judge

1809 Richard J. Daley
Center Chicago, Illinois
60602 (312) 603-5943
Fax: (312) 603-6721

November 3, 2006

Honorable William D. Maddux
Presiding Judge - Law Division
2005 R.J. Daley Center
Chicago, Illinois 60602

HAND DELIVERED

RE: Estate of Derek Thomas
00 P 4257
[01 L 4011]

Dear Judge Maddux:

Please be advised that the Probate Division is handling the Estate of Derek Thomas, a disabled adult, and that file has been in my courtroom for sometime now. With this correspondence I have enclosed a copy of a recent order that I entered on October 26th, 2006.

The memorandum of agreement between the Probate Division and the Law Division has been in effect for over a decade. There is a lot of wisdom in that memorandum of agreement. In the case of the

Estate of Derek Thomas, the original plenary guardian and his attorney ran completely a foul of the probate code and apparently the Code of Civil Procedure up in the Law Division. The only one who suffers from their malfeasance would be Derek Thomas, a disabled adult. I cannot allow the wrongful actions of the guardian and his attorney to prejudice Derek Thomas anymore than it already has so therefore, I entered by order as attached. The current condition of the Law Division case has severely impacted and prejudiced Derek Thomas. My new temporary guardian is an attorney by the name of John Carr. He has been authorized to hire the Clifford Law Firm and together they will try and prosecute the Estate of Derek Thomas in the Law Division. It is my hope and desire to avoid a battle between the Law Division and the Probate Division over a memorandum of agreement.

If you have any ideas and/or suggestions how to repair the damage here and to avoid future problems with our disabled adults and minors I would be most willing to sit down with you.

Very truly yours,
/s James G. Riley
James G. Riley

Exhibit J

No. 07-2122

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

EDUARD ADAM GLAVINSKAS,) as successor plenary guardian of the Estate of DEREK J. THOMAS, a disabled person,	)Appeal from)the Circuit)Court of)Cook County,
Plaintiff - Appellee	) Illinois)Law Division
v.	)Judge Deborah)Mary Dooling
WILLIAM L. DAWSON NURSING CENTER, INC.,	) No. 01 L 04011
Defendant – Appellant	)

DEFENDANT-APPELLANT'S PETITION FOR RE-HEARING PURSUANT TO SUPREME COURT RULE 367

C. William Busse, Jr.
Edward K. Grass
BUSSE, BUSSE, & GRASS, P.C.
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Chicago, IL 60606
312/750/1212
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Atty. No.: 91714

Now comes the defendant-appellant, William L. Dawson Nursing Center, Inc., by and through its attorneys, Busse, Busse, and Grasse, and pursuant to Supreme Court Rule 367, petitions this Honorable Court to re-hear the appeal in this matter, and in support thereof states as follows:

A. The Standard of Review Is De Novo

The defendant argued in its original appellate brief that the standard of review was *de novo*. (Defendant's Appellate Brief, hereinafter, "Def. Brief," p. 4). In support of its position, the defendant cited *People v. Vincent*, 871 N.E.2d 17, 26, 226 Ill.2d 1, 14 (2007) and *First Nat'l Bank of LaGrange v. Lowrey*, 375 Ill.App.3d 181, 872 N.Ed.2d 447 (1st Dist. 2007):

> ...in cases where no fact or witness credibility issues are in dispute, the proper standard of review is de novo. [*Vincent, supra.* at 2.] In this case, there are no disputes as the underlying facts, nor are there any witness credibility issues. Rather, the court is asked to decide whether the trial Court correctly vacated the December 1, 2005, dismissal order approving settlement

between the parties. This is a question of law under the normal rules of civil practice and procedure. [Lowrey, supra. At 203.] Therefore, the standard of review is de novo, and the appellate court is not required to give reference to the trial court's opinion, dicta or findings.

This Court did not address the defendant's argument, but merely stated that the standard of review is an abuse of discretion standard. (Opinion, p. 9). Whether the standard of review is *de novo* or an abuse of discretion standard implicitly affects the remainder of this Court's decision in this matter.

Specifically, whether the court reviews the trial court's opinion under a *de novo* standard, or an abuse of discretion standard, directly affects three issues from this Court's ruling that are not further addressed below: that the plaintiff had a meritorious section 2-1401 claim; that the plaintiff's failure to exercise due-diligence in the underlying matter should be excused; and that the plaintiff exercised due-diligence in bringing his third amended 2-1401 petition. For the reasons set forth on pages 22-36 of its appeal, the defendant submits that

under a *de novo* standard, this Court should not have excused the plaintiff for his attorney's failure to adequately prosecute his case, nor found that the plaintiff exercised due-diligence in bringing his 2-1401 petition.

Furthermore, in finding that the plaintiff had a meritorious section 2-1401 claim, this Court stated that: "it is undisputed that neither Poland nor Belofsky ever approved the settlement...." (Opinion, p.9). This statement is not true: the fact that the settlement was agreed to by Belofsky and Poland forms the very basis of the defendant's appeal. (Def. Brief, p.2-23). Therefore, in addition to misapplying an abuse of discretion standard, this Court misapplied the facts in finding that the plaintiff had a meritorious section 2-1401 claim.

B. The Trial Court Did Not Have Jurisdiction to Hear the Plaintiff's Final 2-1401 Petition

In addition, this Court did not address the defendant's lengthy argument that the plaintiff should not have been allowed to file successive 2-1401 petitions to vacate the trial Court's December 1, 2005, order. (Def Brief, p. 15-21). The defendant cited *Village of Glenview v. Buschelman*, 296 Ill.App.3d 35, 39, 693 N.E.2d 1242, 1245 (1st Dist 1998) in support of its position that "repeated post-judgment motions pursuant to section 2-1401 are prohibited." (Def. Brief., p. 16). The defendant further argued that, pursuant to *Buschelman*, the plaintiff's numerous amended 2-1401 petitions failed to satisfy the necessary statutory requirements for filing such petitions. (Def. Brief pp. 18-21) As such, the trial Court did not have jurisdiction to hear the plaintiff's last amended 2-1401 petition. (Def. Brief. p. 21).

In addition, the defendant argued that the trial court's October 31, 2006, order, dismissing the plaintiff's 2-1401 petition with prejudice was the final order of judgment in the underlying case. (Def. Brief p. 21). The

October 31, 2006, order was modified on November 27, 2006, changing the petition from being dismissed with prejudice to being stricken. Subsequently, on November 29, 2006, the November 27, 2006, order was vacated. Consequently, the October 31, 2006, order was no longer modified, and the case was dismissed with prejudice. (Def. Brief., p. 21).

Based on both of the foregoing arguments, the trial court never had jurisdiction to hear the plaintiff's final 2-1401 petition, both because the plaintiff should not have been allowed to file its last 2-1401 petition, and because the case was dismissed with prejudice as of October 31, 2006. This Court did not address either of these arguments, and the defendant respectfully requests that they be re-heard.

C. **The December 1, 2005, Order Is Not Void**

Lastly, this Court ruled that the trial court's failure to "comply with the procedures outlined" in

"Villalobos v. Cicero School District 99, 362 Ill.App.704, 711(2005)" rendered the December 1, 2005, order void. (Opinion, p. 9-10). As the defendant is unsure as to which procedures in *Villalobos* this court refers (there being no procedures outlined on page 711 of the opinion), the defendant understands this Court's statement to mean that the trial court's failure to properly follow Local Rules 6.4 and 12.15(c) resulted in a void order, and/or that *Villalobos* requires the Probate Court to approve a ward's settlement after the settlement has been approved by the Law Division, as argued by the plaintiff in his response brief. (Plaintiff Brief, p. 14).

In so ruling, this Court did not address the following arguments of the defendant, which support its position that the December 1, 2005, order is a valid and enforceable order: (1) that procedural requirements, such as Local Rules 6.4 and 12.15(c), are procedural in nature and cannot void an order (Def. Brief, p. 13); (2) that Rule 12.15(c) specifically states that the Law Division (and not

the Probate Division) may approve settlements (Def. Brief, p. 13), and (3) that *Villalobos* only stands for the proposition that the Probate Court must approve settlements which are entered into before suit has commenced. (Def. Reply Brief, p. 4).

In support of the first two arguments, the defendant cited *In re Estate of Steinfeld*, 158 Ill.2d 1, 630 N.E.2d 801 (1994); *Lowrey, supra.*, Cook County Local Rule 12.15(c) and the Probate Act, 5/19-8. Read together, the defendant argued, the statutes, rules, and cases definitively do not require Probate approval of settlements already approved by the Law Division; and, in fact, if the law did require Probate approval, Local Rule 12.15(c) would be rendered meaningless. (Def. Brief, p. 13-14).

In addition, the defendant contends that this Court misapplied *Villalobos* in ruling that it requires Probate Court approval of wards' settlements entered into and approved by a Law Division judge. The facts of

Villalobos are plainly distinguishable from the facts of this case and are not controlling or supportive of this Court's conclusion. *Villalobos* dealt with a settlement entered into on behalf of a minor before suit was ever filed. If a lawsuit has not yet commenced and a settlement is reached prior to litigation, petitions must be brought before the Probate Court pursuant to the Circuit Court of Cook County Local Rule 12.15(b).

By contrast, the Circuit Court of Cook County Local Rules specifically provide for different procedures (Local Rule 12.15(c)) when a case has already been filed and is designated before a Law Division judge. (Def. Brief, p. 13). Such separate and distinct rules were presumably created to increase judicial economy, rather than needlessly require two separate judges to approve the same settlement. There is no case law to support what the plaintiff argued and this Court ruled: that the Probate Division must separately approve a ward's settlement which has previously been approved by the

Law Division after suit has been filed. The defendant respectfully requests this Honorable Court to re-hear the defendant's arguments in this matter.

Wherefore, the defendant, William L. Dawson Nursing Center, Inc., respectfully requests this Honorable Court to re-hear the defendant's appeal on the aforementioned issues, and to find in favor of the defendant and against the plaintiff.

Respectfully submitted,

BUSSE, BUSSE & GRASSÉ, P.C.

_____

Edward K. Grassé

No. 07-2122

EDUARD ADAM GLAVINSKAS,) as successor plenary guardian of the Estate of DEREK J. THOMAS, a disabled person,	)Appeal from)the Circuit)Court of)Cook County,
Plaintiff - Appellee	) Illinois)Law Division
v.	))
WILLIAM L. DAWSON NURSING CENTER, INC.,	) No. 01 L 04011)
Defendant – Appellant	)

CERTIFICATE of COMPLIANCE

Now comes the Appellant, William L. Dawson Nursing Center, Inc., by and through its attorneys, Busse, Busse, & Grassé, P.C., certifies that this petition conforms to the requirements of Rules 341(a) and (b). The length of this petition is 5 pages.

Respectfully submitted by:

_____

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for the defendant-appellant,
William L. Dawson Nursing
Center, Inc.

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Attorney No.: 91714

Exhibit K

IN THE SUPREME COURT OF ILLINOIS

EDUARD ADAM GLAVINSKAS,) as successor plenary guardian of the Estate of DEREK J. THOMAS, a disabled person,	)Petition for Leave)to Appeal to the)Supreme Court of)Illinois
Plaintiff - Appellee	) Pursuant to)Supreme Court
v.	)Rule 315)Appeal from First
WILLIAM L. DAWSON NURSING CENTER, INC.,	) District Appellate)Court) No. 01 L 04011
Defendant – Appellant	)

PETITION FOR LEAVE TO APPEAL PURSUANT TO SUPREME COURT RULE 315

1. **PRAYER FOR LEAVE TO APPEAL**

Now comes the appellant, William L. Dawson Nursing Center ("Dawson"), and pursuant to Illinois Supreme Court Rule 315, prays for leave to appeal to the Supreme Court of Illinois.

2. **STATEMENT REGARDING JUDGMENT**

Judgment Entered:	June 27, 2007
Appeal Filed:	July 27, 2007
Appeal Denied:	December 16, 2008
Petition for Rehearing Filed:	January 6, 2009
Rehearing Denied:	July 13, 2009

3. STATEMENT OF POINTS RELIED UPON BY APPELLANT

A. The Circuit Court Lacked Jurisdiction to Hear the Plaintiff's 2-1401 Petition

B. The Standard of Review is De Novo

C. The December 1, 2005, Dismissal Order Is Not Void

4. STATEMENT OF FACTS

Following a settlement agreed to by the parties and the court, a dismissal order was entered. The plaintiff filed a 2-1401 petition to vacate this dismissal, which was originally denied with prejudice. The plaintiff then filed a 2nd 2-1401 petition, which was eventually granted. Defendant now appeals that order. This appeal arises out of a complicated set of procedural facts that occurred at the trial level, after the case was settled and dismissed. To fully understand the procedural

posture of this case, the facts have been organized into two sections below:

A. PRE-SETTLEMENT

This matter arises out of a motor vehicle accident that occurred on October 30, 1999. R. C3. The disabled plaintiff, Derek Thomas, was a passenger in a car driven by Robert Martin. The car was owned by the defendant-appellant, William L. Dawson Nursing Home (Dawson). R. C3. The car in use was normally driven by Pamela Orr, the President of Dawson. . R. C173-4. The driver of the vehicle, Robert Martin, was Ms. Orr's brother, as well as a maintenance worker at Dawson. R. C173-4. Mr. Martin did not have use of a company car in connection with his employment at Dawson, nor was he using the vehicle for any related business purpose at the time of the accident. R. C173-4. On

the date of the accident, Mr. Martin asked Ms. Orr if he could borrow her company car to go to a party, and Ms. Orr gave him permission. R. C173-4. The accident occurred while Mr. Martin was driving home from the party at 6:25 in the morning. R. C3.

The plaintiff's original complaint, filed on April 5, 2001, was filed in two counts: negligent entrustment and negligence based on *respondeat superior*. R. C3. The plaintiff named Dawson as a defendant but did not name Mr. Martin as a defendant at any time. R. C3. Pursuant to the defendant's motion to strike, the court dismissed the negligent entrustment count without prejudice on July 21, 2001. R. C18, C36. Thereafter, the plaintiff filed an amended complaint[4] in 2002, subsequent to vacating an order that dismissed the

[4] The filed amended complaint cannot be found in the record; however, a copy of the amended complaint exists in the record as an exhibit to one of the defendant's motions.C165

case for want of prosecution on July 26,2002. R. C79, C82, C90. The two count amended complaint sounded in *respondeat superior* and negligent entrustment.R. C90. On January 7, 2003, the negligent entrustment count was again dismissed without prejudice. R. C85, C122.

Thereafter, discovery proceeded from January 2003, through November 2003. R. C127. During that time, written discovery, as well as the depositions of Pamela Orr and the plaintiff's guardian, Michael Poland, were completed. R. C133; C172; C392. On November 10, 2003, the Court ruled that Mr. Thomas, previously adjudicated incompetent, was not required to appear for a deposition and was barred from testifying at trial. R. C156.

On December 2, 2003, the defendant filed a motion for summary judgment based on the lack of evidence that Robert Martin was acting within the course and scope of his employment with Dawson at the time of the accident. R. C162. On December 3, 2003, the defendant filed a motion to bar the disclosure of any expert witnesses. R. C191. At the time these motions were filed, this matter was set for trial on February 4, 2004.

While both motions were pending, the parties entered into settlement negotiations. R. C224. On September 22, 2004, the parties met before the Honorable Judge Barbara McDonald for a pre-trial conference. R. C225-6. Present were the plaintiff's attorney, Sheldon Belofsky, the plaintiff's guardian, Michael Poland, and the defendant's attorney, Edward Grassé. R. C489. Judge McDonald

reviewed the facts and the pleadings and spoke with all present. R. C489. The court suggested to Mr. Poland that liability against Dawson was non-existent and that the likelihood of an adverse verdict against the plaintiff was high. R. C489-90. After obtaining approval from Mr. Poland, Mr. Belofsky then informed the court and defense counsel that $175,000.00 would resolve the case. R. C490. At the pre-trial conference, an offer of $150,000 was made. The matter was continued to October 12, 2004; defense counsel merely needed $25,000 additional authority to settle the case. R. C226; C490.

On October 12, 2004, the parties agreed before Judge McDonald to settle the case for $175,000.00. R. C239. It was agreed and understood between the parties that the plaintiff

merely needed to decide whether the settlement would be structured or paid in a lump sum. R. C239. The settlement was memorialized in a letter to the plaintiff's counsel on October 14, 2004. R. C239. As stated in the letter, the defendant acknowledged that the plaintiff needed to have the settlement approved in the Law Division and administered in the Probate Division. R. C239.

B. POST-SETTLEMENT

For nearly one year after the settlement, neither the plaintiff nor his attorney took any action to have the settlement approved. Therefore, the defendant moved to enforce the settlement on September 27. 2004. R. C229. The motion was heard in the Law Division before The Honorable Judge Lopez-Cepero on October 18, 2005, at which time the court ordered the plaintiff to seek approval

of the settlement by October 21, 2004, "or this court shall make its own motion to approve the settlement." R. C245. The matter was continued to October 24, 2005. R. C245.

On October 24th, the plaintiff's counsel appeared in the Law Division and advised that he wanted to enter into a structured settlement and that the motion to approve the settlement would be filed shortly thereafter. R. C246. The matter was again continued to November 30, 2005. R. C246. On that date, the plaintiff still had not filed a motion to approve the settlement, and the matter was continued to the next day. R. C247. On December 1, 2005, the plaintiff's counsel was unable to appear, though the newly appointed guardian *ad litem*, Linda Bryceland[5], was aware of both the date

[5] On October 24, 2005, the guardian ad litem (GAL) Linda Bryceland was appointed by Judge Riley in the Probate Division.

and the location of the hearing. R. C248, C360. At the hearing, defense counsel, Edward Grassé, advised the court as to why the plaintiff's attorney could not be present. R. C1212. Nevertheless, the court, on its own motion, entered an order approving the settlement and dismissing the case with prejudice. R. C248. The December 1, 2005, dismissal order reads as follows: ... the court having fully reviewed the file [and] facts of this case,

> the judge hereby finds that the settlement entered into of $175,000 between the Estate of Derek Thomas and William L Dawson Nursing Home is proper [and] hereby approves the settlement.

R. C352; C1062. Procedures in the Probate Division proceeded simultaneously with those in the Law Division. On September 28, 2005, the defendant moved to intervene in the Probate Division in order to enforce the settlement. R. C340.

This matter is dismissed with prejudice.

On December 30, 2005, Ms. Bryceland filed a petition for leave to intervene in the Law Division case and a motion to reconsider the December 1, 2005, dismissal order. R. C276, C280. In her petition, Ms Bryceland argued that the court should grant her leave to intervene based on concerns about the adequacy of the settlement raised in her December 15, 2005, supplemental guardian ad litem report to the Probate Court. R. C278-9. After Ms. Bryceland's motions were extensively briefed, Judge Lopez-Cepero denied the petition to intervene on May 4, 2006. R. C301; C318.

On February 10, 2006, the Probate Division judge, Judge Riley, suspended the powers of Michael Poland as guardian and appointed John Carr as

temporary guardian. R. C373. On April 18, 2006, Judge Riley discharged Sheldon Belofsky as the plaintiff's attorney and instructed Mr. Carr to hire Clifford Law Offices as the plaintiff's new counsel. R. C376, C378.

On June 21, 2006, the plaintiff's new attorney filed a motion to vacate the December 1, 2005, dismissal order pursuant to Section 2-1401. R. C326. On August 7, 2006, the defendant filed a lengthy reply, which argued that the plaintiff's 2-1401 petition lacked the necessary evidence to be granted. The plaintiff then filed an emergency motion for leave to file an amended petition, to be heard on August 10, 2006. R. C487, C543. The plaintiff failed to appear at the emergency motion, and it was stricken. R. C543. The plaintiff then re-noticed the emergency motion to be heard on August

23, 2006, which was denied. R. C543, C544, C545. On September 6, 2006, the plaintiff filed a reply brief which was, in essence, identical to the amended petition which the plaintiff had just been denied leave to file. R. C553.

On September 19, 2006, the court granted the plaintiff 30 days to produce Mr. Belofsky or an affidavit to support his petition. R. C864. On October 31, 2006, the plaintiff failed to produce Mr. Belofsky for live testimony at the hearing and did not produce any affidavit in support of the 1401 petition. The plaintiff's petition was then heard without an affidavit or live testimony, and on October 31, 2006, the court entered an order stating: "Plaintiff's Motion to Vacate pursuant to 2-1401 is denied with prejudice." R. C865.

On October 18, 2006, Judge Riley in the Probate Division removed Mr. Poland as guardian. R. C858. On October 26, 2006, Judge Riley drafted an order announcing his rejection of the settlement that Judge Lopez-Cepero had approved almost one-year prior. R. C860-2.

Back in the Law Division, on November 27, 2006, the plaintiff presented a motion for reconsideration of the October 31, 2006, order. That motion was never heard as the Judge Lopez-Cepero entered an order stating, "... the court hereby corrects its October 31, 2006, order, nunc pro tanc, from dismissal [with] prejudice to [Plaintiff's] motion being stricken..." R. C752. Judge Lopez-Cepero also recused himself from further handling of the case and transferred the plaintiff's motion to

reconsider to Judge Maddux for reassignment. R. C752.

On November 29, 2006, the parties appeared before Judge Maddux on the plaintiff's emergency motion for reassignment. On that date, Judge Maddux entered an order striking Judge Lopez-Cepero's November 27, 2006, order and reassigning the case to his courtroom. R. C997. In a separate order entered that day, Judge Maddux granted the plaintiff leave to "re-file [his] 1401 petion [sic] by December 20, 2006." R. C1073.

Following the entry of Judge Maddux's November 29, 2006, order, counsel for the plaintiff and the defendant received a November 3, 2006, letter from Judge James G. Riley to Judge Maddux in which Judge Riley voiced his disapproval of the Law Division's handling of this matter. R. C1078-

1079. Judge Riley then asked Judge Maddux for suggestions on how to "repair the damage here.". R. C1078-9. Although not discovered until much later, both Judge Lopez-Cepero and Judge Maddux had received this letter prior to their respective November 27 and November 29 orders.

On March 6, 2007, the defendant moved for a substitution of judge as a matter of right. R. C1033. On April 2, 2007, Judge Maddux entered an order reassigning this matter to Judge Deborah Mary Dooling. R. C1081.

The plaintiff filed another 2-1401 petition on December 20, 2006, which was heard by Judge Dooling. R. C878. The petition was fully briefed and oral argument was heard. Again, the plaintiff presented no evidence and did not submit any affidavit in support of his petition, despite being

given an evidentiary hearing to do so. Judge Dooling granted the plaintiff's petition on June 27, 2007. R. C1221. The court found that the December 1, 2005, dismissal order was void pursuant to *Villalobos v. Cicero School District 99*, 362 Ill.App.3d 704 (1st Dist. 2005), as Cook County Circuit Court Rules 6.4 and 12.15(c) had not been followed in approving the settlement. R. C123.The court also found that the plaintiff had a meritorious claim for relief from judgment and that the plaintiff was excused from the due-diligence requirements because of his disability. R. C1224-7.

On July 31, 2007, the defendant filed an appeal, which was denied on December 16, 2008. The appellant filed a petition for rehearing on January 6, 2009, which was also denied on July 13, 2009.

4. ARGUMENT

This matter presents two issues of great importance: 1) Can the appellate court completely ignore the defendant's argument that neither the circuit court nor the appellate court had proper jurisdiction over this case; and 2) Can a circuit court vacate a valid and binding settlement and dismissal order by utilizing circuit court rules that are more restrictive than state law, specifically the Probate Act?

The defendant appeals to this Court to correct several injustices that were done at the circuit and appellate court levels. Principally, the circuit court never had proper jurisdiction to hear the plaintiff's final 2-1401 petition. This argument was raised before the appellate court, but was neither addressed nor ruled upon. In addition, the

defendant has been grievously deprived of substantive rights by the handling of this case in the underlying courts: First by the trial court, in undoing a valid and binding settlement, and then by the appellate court, in ignoring the jurisdictional issues the defendant raised in its appeal.

The defendant settled this case during multiple pre-trial conferences before Judge McDonald, in which all parties were present, including Mr. Poland, the plaintiff's guardian and his attorney, Sheldon Belofsky. The settlement was approved by two judges in the circuit court, and the case was dismissed with prejudice. Subsequently, and without jurisdiction, the trial court improperly voided the dismissal order. Then, without addressing the jurisdictional arguments raised by the defendant, and ignoring the standard of review proposed by the defendant, the appellate

court gave complete deference to the trial court's final order. In doing so, the appellate court violated its duty to address the jurisdictional arguments raised by the defendant. The defendant raised an argument that must be addressed by the courts, which has not been addressed by the courts. Such amounts to a violation of the defendant's due process rights: the defendant has been deprived of a full hearing on jurisdictional arguments that cannot be waived.

Thus, while the trial and appellate courts' opinions seem to focus solely on the rights of the plaintiff as a ward of the court, the rights of the defendant have been patently ignored. The defendant argued in its original appeal that these rights must be fairly balanced: A disabled plaintiff is deserving of the protection of the courts, but a defendant is equally deserving of the rights afforded

to it under the Code of Civil Procedure and the Constitution. Based on the the lower courts' rulings, a defendant can never reasonably expect finality or closure to a case, because the courts will allow a ward every opportunity, even after jurisdiction has been lost, to re-open and re-litigate his case.

At the time of settlement in this matter, the defendant had properly followed the Rules of Civil Procedure and had addressed the case as it stood before the trial court: as the only defendant defending a count based on *respondeat superior*. Circuit Court Judge Barbara McDonald presided over the pre-trial conferences, and the court and all parties agreed to the settlement. The settlement was subsequently reviewed and approved by the trial court, and the case was dismissed. The procedural quagmire that followed, which includes the improper entry of orders after jurisdiction was

lost, is deserving of attention by this Court. That a valid and binding settlement reached before a circuit court judge can be completely un-done is an issue of great importance to be addressed by this Court.

In addition, this appeal raises the issue of whether local rules can ever trump state law. According to the lower courts' rulings, a binding settlement and dismissal order can be un-done by the failure to follow procedural Cook County Circuit Court Local Rules, based on their interpretation of *Villalobos v. Cicero School District 99*, 362 Ill.App.704 (2005). As procedural rules do not void orders, and local rules cannot be more restrictive than state law, this appeal should be taken to resolve these issues.

A. The Circuit Court Lacked Jurisdiction to Hear the Plaintiff's 2-1401 Petition

The trial court never had jurisdiction to hear the plaintiff's final 2-1401 petition, both because the case was dismissed with prejudice as of October 31, 2006, and because the plaintiff should not have been allowed to file multiple 2-1401 petitions. Whether the circuit court had jurisdiction to hear the plaintiff's final 2-1401 petition is a matter of self-evident importance and is an issue that cannot be ignored by the appellate court.

1. The Trial Court Lost Jurisdiction to Hear the Plaintiff's Final 2-1401 Petition After October 31, 2006, When the First 2-1401 Petitition Was Dismissed with Prejudice

On October 31, 2006, the plaintiff's 2-1401 petition (which sought to vacate the December 1,

2005, dismissal order) was denied with prejudice. Although Judge Lopez-Cepero subsequently ruled that his October 31, 2006, order should be amended on its face, that order was subsequently vacated by Judge Maddux. R. C997. By consequence, the October 31, 2006, order was no longer modified but was left to stand on its original language: dismissing the case with prejudice. (Def. Brief., p. 21) Once Judge Maddux vacated the prior order, the October 31, 2006, order must stand. As that order denied the plaintiff's 2-1401 petition with prejudice, the case ended at that point. Once the case ended, the circuit court no longer had jurisdiction to hear the case any further. Any appeal of this matter should have been from that October 31, 2006, order dismissing the 2-1401 petition with prejudice. No such appeal was ever filed by the plaintiff.

2. The Trial Court Did Not Have Jurisdiction to Hear Successive 2-1401 Petitions

In its appeal, the defendant argued that the plaintiff never had jurisdiction to file successive 2-1401 petitions to vacate the trial court's December 1, 2005, dismissal order. (Def. Brief, p. 15-21). The defendant cited *Village of Glenview v. Buschelman*, 296 Ill.App.3d 35, 39, 693 N.E.2d 1242, 1245 (1st Dist 1998) in support of its position that "repeated post-judgment motions pursuant to section 2-1401 are prohibited." (Def. Brief, p. 16). The defendant further argued that, pursuant to *Buschelman*, the plaintiff's numerous amended 2-1401 petitions failed to satisfy the necessary statutory requirements for filing such petitions. (Def. Brief pp. 18-21)

The plaintiff's first attempt to vacate the December 1, 2005, order pursuant to 2-1401 was properly denied with prejudice for failing to satisfy the statutory and evidentiary requirements of Section 2-1401. *See People v. Vincent*, 226 Ill.2d 1, 871 N.E.2d 17 (2007). The plaintiff's initial petition lacked evidence upon which the court could base an opinion on the plaintiff's counsel's diligence. R. C864.

The plaintiff sought to amend his petition twice, and both times the motion to amend was denied. R. C543; C544. Significantly, neither of the plaintiff's proposed amended petitions offered additional grounds that could not have been previously adjudicated or addressed. The motions were identical, based only on the vague intent to clarify the record and prevent injustice. R. C547.

On September 6, 2006, the plaintiff filed a reply brief that was nearly identical to his proposed amended petition. R. C553. This reply contained only 17 lines that were different from the previous amended petition and presented no evidence curing the original defects of the petition. SR. 1 C30. The plaintiff's new brief failed to allege any grounds that were not or could not have been previously adjudicated or that corrected his original 2-1401 petition. Rather, it presented legal arguments that would have been more appropriate for an appeal, and it alleged facts already adjudicated in prior proceedings.

Though he was granted 30 days to produce Mr. Belofsky or an affidavit, the plaintiff failed to produce any evidence to support his 2-1401 petition, as required by statute. R. C864. In its October 31,

2006, order, the court stated that the petition "**must** be supported by affidavit or other appropriate showing as to matters not of record....The language of the statute is clear thereby eliminating the exercise of any discretion by this court." R. C752. Judge Cepero's October 31, 2006 order, whether it struck or dismissed the plaintiff's 2-1401 petition with prejudice, resolved all issues in favor of the defendant, as the plaintiff failed to supply sufficient proof of any right to relief under Section 2-1401. After October 31, 2006, the plaintiff should not have been allowed to file another 2-1401, pursuant the holdings in **Buschelman**, supra.

3. The Probate Court Orders After December 1, 2005, Are Void

Finally, the defendant argued that after the December 1, 2005, dismissal order was entered, the Probate Court had no jurisdiction to enter any orders affecting or rejecting the settlement. (Def. Brief. p. 28-30). Once a final order has been entered, the court has no jurisdiction to re-open litgation *sua sponte* more than 30 days after judgment has been entered. *See Welch v. Ro-Mark, Inc.*, 79 Ill.App.3d 652, 398 N.E.2d 901, 904 (1st Dist. 1979). Furthermore, according to Cook County Local Rule 12.15(c), the Probate Court's only role after settlement has been approved and entered by a judge in another division is to control the distribution of proceeds. *See* Local Rule 12.15(c). The Probate Court, therefore, had no jurisdiction over the Law Division case, and any order entered by the Probate court after the December 1, 2005,

dismissal which attempted to change the status of the Law Division case is void.

4. The Appellate Court Did Not Address the Above Jurisdictional Arguments

If these arguments were addressed and rejected by the appellate court, the defendant would be able to present a counter-argument to this Court. The appellate court, however, did not state in its opinion that it rejected the defendant's jurisdictional arguments. Nor did it state why it would not address them. The court just ignored them. "'Th[e] court has an obligation to take notice of matters which go to the jurisdiction of the circuit court" in each case before it." *State v. M.W.* 232 Ill 2d 408 (2009), *quoting Belleville Toyota v. Toyota Motor Sales U.S.A. Inc.,* 199 Ill.2d 325, 334, 770 N.E.2d 177 (2002). *See also, Eastern v. Canty,* 75 Ill.2d 566,

570, 389 N. E. 2d 1160, 1162 (1979) ("It is the obligation of the reviewing court to take notice of matters which go to the jurisdiction of the circuit court.") The appellate court's silence in this matter thus constitutes reversible error.

B. The Standard of Review Is De Novo

In addition, the appellate court did not address the defendant's argument that the standard of review in this case was *de novo*. The court merely stated that the standard of review is abuse of discretion and explained its reasoning and conclusions based on this presumption.

First, whether a trial court has jurisdiction is a question of law subject to *de novo* review. *See Dir. of Ins. v. A & A Midwest Rebuilders, Inc.*, 383 Ill. App. 3d 721 (2nd Dist. 2008). Second, even if this Court is not persuaded that the circuit court lacked

jurisdiction to hear the plaintiff's 2-1401 petition, the standard of review is still *de novo* for the remainder of the defendant's arguments. Should this Court find that the standard of review is *de novo*, the appellate court's decision to apply an abuse of discretion standard necessarily affects its support of the trial court's opinion.

As there are no fact or credibility disputes in the underlying case, the question of whether the December 1, 2005, dismissal order was correctly vacated is a matter of law, and, therefore, the standard of review is *de novo*: "...in cases where no fact or witness credibility issues are in dispute, the proper standard of review is *de novo*." *People v. Vincent*, 871 N.E.2d 17, 26, 226 Ill.2d 1, 14 (2007). The appellate court was asked to decide whether the trial court correctly vacated the December 1, 2005,

dismissal order approving settlement between the parties. This is a question of law under the rules of civil practice and procedure. *See First Nat'l Bank of LaGrange v. Lowrey*, 375 Ill.App.3d 181, 872 N.Ed.2d 447 (1st Dist. 2007).

As stated, the appellate court did not address the defendant's argument, but merely stated that the standard of review is an abuse of discretion standard. (Opinion, p. 9). Whether the standard of review is *de novo* or an abuse of discretion standard implicitly affects the remainder of this appellate court's decision in this matter. Specifically, whether the court reviews the trial court's opinion under a *de novo* standard, or an abuse of discretion standard, directly affects three issues from the appellate court's ruling: that the plaintiff had a meritorious section 2-1401 claim; that the plaintiff's failure to

exercise due-diligence in the underlying matter should be excused; and that the plaintiff exercised due-diligence in bringing his third amended 2-1401 petition. For the reasons set forth in its appeal, the defendant submits that under a *de novo* standard, the appellate court's review would have been substantially different.

C. The December 1, 2005, Dismissal Order Is Not Void

Lastly, the appellate court ruled that the trial court's failure to "comply with the procedures outlined" in "Villalobos v. Cicero School District 99, 362 Ill.App.704, 711 (2005)" rendered the December 1, 2005, dismissal order void. (Opinion, p. 9-10). As the defendant is unsure as to which procedures in *Villalobos* the appellate court referred (there being no procedures outlined on page 711 of the opinion),

the defendant understands the statement to mean that either the trial court failed to properly follow Local Rules 6.4 and 12.15(c), which resulted in a void order, and/or that *Villalobos* requires the Probate Court to approve a ward's settlement after the settlement has been approved by the Law Division.

In so ruling, the appellate court again did not address the following arguments of the defendant, which support its position that the December 1, 2005, dismissal order is a valid and enforceable order: (1) that procedural requirements, such as Local Rules 6.4 and 12.15(c), are procedural in nature and cannot void an order (Def. Brief, p. 13); (2) that Rule 12.15(c) specifically states that the Law Division (and not the Probate Division) may approve settlements (Def. Brief, p. 13); and (3) that

Villalobos only stands for the proposition that the Probate Court must approve settlements which are entered into before suit has commenced. (Reply brief, p. 3-4).

Orders are only void where the court lacks jurisdiction to enter the order in the first place. *In re Estate of Steinfeld*, 158 Ill.2d 1, 12, 630 N.E.2d 801 (1994). The *Steinfeld* court ruled that the statutory requirements outlined by the Probate Act are merely procedural in nature, not jurisdictional. *See id* at 16. Furthermore, the failure to follow procedural rules does not void an order. *See id.* Therefore, the fact that local procedural rules were not followed by the court on December 1, 2005, does not void the order. Judge Lopez-Cepero had jurisdictional authority to approve the settlement agreement, which would not be "un-done" by the

Probate Court rejecting the settlement after a final judgment had been entered. *See First Nat'l Bank of LaGrange v. Lowrey*, 375 Ill.App.3d 181, 872 N.E.2d 447 (1st Dist. 2007) (trial court has authority to approve settlements);

The Law Division has the authority to approve and settle cases pursuant to the Probate Act, Cook County Local Rule 12.15(c), case law, as well as the unpublished memoranda to which the plaintiff referred in his 2-1401 petition. *See id. See also, Will v. Northwestern Univ.*, 378 Ill.App.3d 280, 293-4, 881 N.E.2d 481, 496-7 (1st Dist. 2007). Section 5/19-8 of the Probate Act states that settlements must be approved by "the court;" it does not specify that cases must be approved by the Probate Division. The statute states as follows:

> By leave of court without notice or upon such notice as the court directs, a representative may compound or compromise any claim or any interest of the ward or the decedent in any personal estate or exchange any claim or any interest in personal estate for other claims or personal estate **upon such terms as the court directs (emphasis added)**.

This section has been interpreted to mean that the settlements of minors and disabled persons requires court approval. *E.g. Lowrey, supra.*

When the Probate Act is read in conjunction with Cook County's local rules, it is clear that other divisions besides the Probate Division can approve

minors' and disabled person' settlements. Local Rule 12.15(c) reads as follows:

> (c) If an action for personal injury to a minor or a disable person...is pending before another Division, the role of the Probate Division shall be as provided in this subparagraph.
>
> > (i) If the action is for personal injury and is disposed of in another Division by an order entering judgment for the plaintiff or approving a settlement, the guardian of the estate of the ward...shall file in the court a petition for authority to receive the proceeds of the action in accordance with the provisions of Rule 6.4 or Rule 6.5 as the case my be.

Hence, after settlement of a ward's case pending in another Division, the Probate Division's only role is to distribute the funds of the settlement.

Local rules cannot be more restrictive than those enumerated by the Probate Act, which only requires court approval of a settlement:

> Although circuit courts share some authority with [the Illinois Supreme Court] to make rules, the rules promulgated by the circuit court are subject to review...and may not conflict with [Supreme Court Rules]. (citation omitted)....[Supreme Court] Rule 21(a) codifies these long-held principles by vesting the circuit courts with the power to adopt local rules governing civil and criminal cases **so long as: (1) they do not conflict with supreme court rules or statutes**, and (2)

> so far as practical, they are uniform throughout the state. 134 Ill. 2d R. 21(a). Circuit courts, however, "are without power to change substantive law or impose additional substantive burdens upon litigants." *Vision Point of Sale, Inc. v. Haas*, 226 Ill. 2d 334, 357, 875 N.E.2d 1065, 1080 (2007), *citing People ex rel. Brazen v. Finley*, 119 Ill. 2d 485, 491, 519 N.E.2d 898, 116 Ill. Dec. 683 (1988) and *Kinsley v. Kinsley*, 388 Ill. 194, 197, 57 N.E.2d 449 (1944) (emphasis added)..

By declaring the dismissal order void, the trial court and appellate court ignored established Supreme Court precedent and allowed circuit court rules to trump state law.

In addition, the appellate court misapplied *Villalobos* in ruling that it requires Probate Court

approval of wards' settlements entered into and approved by a Law Division judge. The facts of *Villalobos* are plainly distinguishable from the facts of this case and are not controlling or supportive of the appellate court's conclusion. *Villalobos* addressed a settlement entered into on behalf of a minor before suit was ever filed. If a lawsuit has not yet commenced and a settlement is reached prior to litigation, petitions must be brought before the Probate Court pursuant to the Circuit Court of Cook County Local Rule 12.15(b).

By contrast, the Circuit Court of Cook County Local Rules specifically provide for different procedures (Local Rule 12.15(c)) when a case has already been filed and is assigned to a Law Division judge. (Def. Brief, p. 13). Such separate and distinct rules were presumably created to increase

judicial economy, rather than needlessly require two separate judges to approve the same settlement. There is no case law to support the appellate court's ruling that the Probate Division must separately approve a ward's settlement which has previously been approved by the Law Division after suit has been filed. Such a rule is not contemplated by the Probate Act, which merely requires court approval of a ward's settlement.

CONCLUSION

For the foregoing reasons, the appellant, William L. Dawson Nursing Center, Inc., respectfully requests that this court grant this petition for leave to appeal and reverse and/or remand the decision of the Illinois Appellate Court.